85-813

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
*Petitioner,*

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court of appeals violated petitioner's Seventh Amendment right to jury trial by determining as a matter of law that no fiduciary obligation existed between the parties.

2. Whether the court of appeals' holding that the trial court did not submit the fraud issue to the jury contradicts Rule 49(a) of the Federal Rules of Civil Procedure and prior decisions of this Court.

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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

## PETITION FOR A WRIT OF CERTIORARI

Minnesota Timber Producers Association, Inc., through its attorney, petitions this Honorable Court for a writ of certiorari to review portions of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

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* Named parties in the action below in addition to petitioner and respondent, include Tom Evenson, James Hall, Thomas McCabe, Clayton Peterson, John Sullivan, and all others similarly situated, as Apellees/Intervenors.

## OPINION BELOW

The opinion of the court of appeals is reported at 766 F.2d 1261. The opinion is reproduced as petitioner's Appendix A at page A-1.

## JURISDICTION

The judgment of the court of appeals was entered on July 11, 1985, and a petition for rehearing was denied on August 20, 1985. See petitioner's Appendices B and C at pages A-15 and A-16 respectively. This petition is submitted pursuant to Rule 19 of the United States Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. Rule 49(a) of the Federal Rules of Civil Procedure provides:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

## STATEMENT

The petitioner and plaintiff in this action is the Minnesota Timber Producers Association (Association), a Minnesota nonprofit corporation. The defendant in this action is American Mutual Insurance Company of Boston (American Mutual), a large insurance carrier with its home offices located in Wakefield, Massachusetts.

In 1969 American Mutual communicated to the Association that it was interested in writing a workers compensation group insurance program for Association members. American Mutual presented written "formal" proposals for a Workers Compensation Safety Group Dividend Plan (the Plan or MPTA-AM Plan) to Association representatives in July of 1972.

The parties negotiated on the formal proposal for a number of months. There were several points in contention. One of the most significant was that the Association opposed including a contingency balance fund in the Plan. It was finally agreed that the MTPA-AM Plan would include a contingency balance fund. The parties agreed that the monies in the contingent fund belonged to the Association but were held in escrow by American Mutual. A copy of the "plan" as agreed upon by the parties is reproduced as petitioner's Appendix D at p. A-17-18.

In December 1972 the Association Board of Trustees by formal action accepted and agreed to the MTPA-AM Plan. Minimum contribution requirements necessary to commence the Plan were met in July of 1973 and the plan became effective and operational retroactively to May 1, 1973.

The basic concept of the MTPA-AM Workers Compensation Safety Group Dividend Plan was to pool experiences, losses, and premiums of individual participating members under the master agreement between American Mutual and the Association. The policyholders would not be rated individually but would be issued individual policies.

The MTPA-AM Plan provided that each participant would pay a premium for workers compensation insurance coverage at the rate set by Minnesota law. This premium was pooled with the premiums paid by other MTPA-AM Plan participants. Pursuant to the plan American Mutual deducted from the pooled premium various charges including basic administration charges, total group losses, adjustments to reserves, and an insurance charge. Under the MTPA-AM Plan, the balance of the premium ("Gross Dividend") after these deductions was to be redistributed to the individual policyholders as cash dividends.

Five provisions critical to this litigation were contained in the MTPA-AM agreement. They were as follows:

1) To avoid large fluctuations in annual dividends, part of the "Gross Dividend" was set aside to fund a contingent balance escrow fund.

2) The contingent balance fund was to be held in escrow by American Mutual.

3) The only purpose of the contingent balance escrow fund, according to the agreement between the parties, was to stabilize the annual dividend distribution to Plan participants.

4) The MTPA-AM Plan specifically provided that this escrowed money belonged to the Association and not to the insurance company.

5) The contingent balance escrow fund was subject to a cap-level limitation. Thus, the maximum contingent balance figure on two million dollars in premiums would be approximately $230,000.

Under the MTPA-AM Plan, the annual dividends were to be paid approximately eight months after the close of the policy year. The most appealing aspect of the Plan was that each participant was to receive the same percentage dividend, based on his individual total premium, as the other participants regardless of his individual loss experience.

The agreement between the parties was systematically followed from 1973 to 1978. Plan losses and the contingent fund status were regularly reported by American Mutual representatives to the Association. Various problems pertaining to the Plan were regularly reviewed and acted upon by the Association through its Insurance Committee and Board of Directors.

In 1978 unknown to anyone, except American Mutual representatives, American Mutual created a new separate fund. American Mutual then proceeded to retain in this fund substantial sums of money that properly should have been paid to the participants in the form of dividends under the MTPA-AM Plan formula. American Mutual characterized this additional account as a "dividend stabilization fund", even though American Mutual knew that the amounts being placed in the fund were far in excess of what was permitted by the MTPA-AM agreement.

During the period from 1978 to 1980 the Association and the Plan participants grew increasingly concerned with rising insurance costs, interest rates, and the inadequate servicing of accounts by American Mutual. Decreases in the number of logging contracts and increased workers compensation costs caused the Association to have doubts about its continued participation with American Mutual in the MTPA-AM Plan. The Association, however, had no knowledge that American Mutual had established the dividend stabilization fund, and thereby diverted

hundreds of thousands of dollars from the agreed Plan. The Association officers simply did not understand why the Plan was not working properly.

At various times during this period, Mr. Joe Penn, American Mutual's account representative for Minnesota, consistently misrepresented the amount of withheld funds to Association officials. Specifically, in November 1978 Mr. Penn represented to the Association that the amount of withheld funds equaled $188,000 when in fact, American Mutual held over $415,000. In April 1980 Mr. Penn informed the Association that $217,184 was being held by American Mutual. In truth, American Mutual held $599,712. In July 1980 Mr. Penn represented that the withheld balance was $225,000. In reality the balance was $411,126.

Mr. Penn was reporting what he knew to be deceptive and incorrect figures as the amounts withheld by American Mutual. The amounts represented did, however, basically comport with the cap-level on two million dollars in premiums. For this reason the Association did not suspect that American Mutual had altered the procedure for determining the escrow amounts.[1]

In March 1981, after efforts to reform the parties' agreement proved fruitless, the Association notified American Mutual in writing that the Association's Board of Directors had voted to terminate the Minnesota Timber Producers Workers Compensation Safety Group Dividend program with American Mutual. The MTPA-AM Plan policies continued in effect until the end of the policy year on April 30, 1981. Thereafter, most of the MTPA-AM Plan policyholders discontinued their coverage with American Mutual.

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[1] Association representatives did not become aware until after termination of the contract and commencement of this litigation in federal district court that American Mutual had in fact retained amounts substantially in excess of the amounts represented by Mr. Penn.

Subsequent to its termination of the contract, the Association requested that American Mutual return the escrowed funds in the contingent balance fund, which under the terms of the contract between the parties belonged to the Association. American Mutual refused to return the escrowed funds and took the position that the Association's termination of "its endorsement" did not have the effect of terminating the MTPA-AM group and therefore, the Association had no right to the fund balance.

The Association initiated legal action in Federal District Court for the District of Minnesota seeking the return of the money in the contingent balance escrow fund, damages for lost interest, and punitive damages for American Mutual's fraudulent misrepresentations. Federal jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. §1332.

A four day jury trial was held in April of 1984 in Duluth, Minnesota, the Honorable Miles W. Lord presiding. The jury returned a special verdict awarding the Association $237,836 in compensatory damages and $1,000,000 in punitive damages.

American Mutual appealed the district court judgment on the basis that the Association was not a real party in interest, that the evidence did not support the jury finding that a contract existed between the Association and American Mutual, and that no proof existed of an independent tort upon which an award of punitive damages could be based under Minnesota law. American Mutual also appealed the district court's order allowing the intervention of numerous individual policy holders following the entry of judgment by the trial court and the certification of the suit as a class action by the trial court.[2] Oral argument was heard in early December of 1984 and the court of appeals issued its decision in July of 1985.

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[2] The court of appeals did not address the class action portion of this litigation and petitioner does not raise it here.

The Court of Appeals for the Eighth Circuit held that the evidence supported a jury finding that a contract existed between the Association and American Mutual; that the evidence supported the jury finding that American Mutual breached its contract with the Association; that the amount of compensatory damages awarded by the jury to the Association was incorrect; that the cause of action based on fraud was not submitted to the jury; and that as a matter of law American Mutual owed no fiduciary duty to the Association. Further, the court of appeals held that because no separate cause of action based on fraud was submitted to the jury and because no fiduciary relationship existed as a matter of law, the jury improperly awarded exemplary damages to the Association.

## REASONS FOR GRANTING THE PETITION

The petitioner is keenly aware that this Court is loathe to grant certiorari to review evidence and specific facts. See *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959) (Frankfurter, J., dissenting). This case, however, raises important questions concerning a party's Seventh Amendment right to jury trial and the proper application of Rule 49(a) of the Federal Rules of Civil Procedure. Therefore, the review and settlement of the questions presented to this Court constitute matters of substantial importance to the general litigating public and not simply the parties to this action. See *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

### 1. The Court Of Appeals Has Overstepped Its Review Powers In Contravention Of Plaintiff's Seventh Amendment Right To Trial By Jury.

The Seventh Amendment to the United States Constitution provides that no fact determined by a jury shall be reexamined except in accordance with the rules of common law. U.S. CONST. AMEND. VII. This Court has always jealously guarded this constitutional right. *Slocum v. New York Life Insurance Company*, 228 U.S. 364 (1913).

The opinion of the court of appeals in this case is totally devoid of any statement of the applicable standard of review for vacating the jury's determination that American Mutual breached its fiduciary obligation to the Association. The standard in the Eighth Circuit appears to be that:

> An appellate court may not substitute its view of the facts for that of the trier of fact unless it is in a position to hold that reasonable minds, viewing the evidence in the light most favorable to the prevailing party, could only have found otherwise than the trier of fact.

*Ben Gay, Inc. v. Giesbrecht*, 720 F.2d 1003, 1005 (8th Cir. 1983); *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 158

(8th Cir. 1978), *cert. denied,* 439 U.S. 864 (1978). The court of appeals did not follow its own rule in this case.

The findings of the court of appeals that American Mutual owed the Association no fiduciary duty and that American Mutual was entitled to use the monies in the contingent balance fund to cover unexpected losses have no support in the trial record and are totally against the weight of the evidence. American Mutual produced only one witness at trial. That witness, an underwriting vice president, was never involved in negotiating the agreement between the parties nor in the operation of the Plan during its first seven years of existence. Yet the court of appeals, without explaining the basis of its decision, determined as a matter of law that no fiduciary relationship existed between the Association and American Mutual, in spite of the escrow agreement, and that American Mutual had the right to use the escrowed funds to pay its losses.

This Court has clearly stated that it is not the function of an appellate court to search the record for conflicting evidence in order to take the case away from the jury on the theory that the proof also supports inconsistent inferences from those drawn by the jury. *Tennant v. Peoria & P.U. Railway Company,* 321 U.S. 29, 35 (1944). To the point, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* at 35.

In this case, the court of appeals has conducted what can only be characterized as an improper de novo weighing of the evidence in the record. Such a procedure is contrary to the commands of the Seventh Amendment right to jury trial. *Dawson v. Chrysler Corp.,* 630 F.2d 950, 959 (3rd Cir. 1980).

a. **By holding that defendant American Mutual owed no fiduciary duty to the Association the Court of Appeals for the Eighth Circuit has acted as a trier of fact and substituted its judgment for that of the jury.**

Because jurisdiction in this case is based on diversity of citizenship, Minnesota substantive law applies to the merits. Under Minnesota law the existence of a fiduciary relationship is a question of fact. *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). The court of appeals, contrary to the jury finding, held as a matter of law that no fiduciary relationship existed between the Association and American Mutual. Appendix at p. A-12. The court of appeals, however, overlooked two incredibly important facts.

First, the agreement between the parties required that the Association, through its Insurance Committee, represent the Plan participants. Uncontroverted and undisputed testimony at trial established that American Mutual treated the Association as the participants' agent and the Association accepted and acted on that responsibility for many years. Therefore, American Mutual's duty to act in good faith and in an honest, forthright manner towards the individual participants also extended to the Association.

Second, the court of appeals ignored the controlling fact that the parties' agreement provided for an escrow arrangement. Pursuant to the contract between the parties, American Mutual placed "escrowed" monies in the contingent balance fund. These funds belonged "to [the] Association." There is no question as to the fiduciary nature of an escrow relationship. *Avalon East, Inc. v. Monaghan*, 251 N.Y.S. 2d 290, 296 (N.Y. Sup. Ct. 1964).

The court of appeals found that the parties were dealing at arms length and that the only evidence to support the Association's assertion of a fiduciary relationship was testimony that the Association "trusted" American Mutual. Appendix at

p. A-12. If the court of appeals had carefully reviewed the record it would have found that much more than simple "trust" of American Mutual by the Association was involved in the handling of these escrowed funds.

American Mutual is an insurance expert. The Association and the plan participants are laymen in regard to insurance. Testimony at trial pertaining to the operation of the Plan made clear that the Association looked to and relied on the expertise of American Mutual in insurance matters while the Association contributed its expertise in logging and timber production matters. For the court of appeals to find that the parties were equals dealing at arms length is simply incongruous. See Appendix at p. A-12. Compare *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 183 (8th Cir. 1971) (the court takes notice of inequalities between computer company and automobile dealer).

At trial the court carefully instructed the jury on the issue of fiduciary relationships. The special verdict form contained a question specifically addressed to the issue of fiduciary obligation. The jury heard testimony on and recognized the escrow arrangement. The jury also recognized that as an insurance company American Mutual had a superior knowledge and substantial influence over the Association and the Plan participants pertaining to all financial aspects of the Plan. The jury's finding that American Mutual committed a breach of trust and violated its fiduciary relationship is in accordance with this recognition.

The court of appeals, however, without any explanation or support in the record, has incorrectly substituted its judgment for that of the jury by holding that American Mutual owed no fiduciary obligation to the Association. See *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946) (no reversible error occurs unless there is a complete lack of probative facts to support the jury's conclusion; any inferences contrary to the jury's view that might be drawn from the evidence become totally irrelevant and immaterial on appeal).

b. **Amounts in the contingent balance fund were not available to pay the insurance company's losses.**

The court of appeals' determination that the contingent balance fund sums were available to pay losses is simply wrong. The court of appeals is correct, however, in its holding that the money contained in the contingent balance escrow fund of the Safety Group Dividend Insurance Plan belongs to the participants of the Plan. Appendix at p. A-10.

The court of appeals held that upon termination of the insurance group the participants would be entitled to a full accounting and return of the funds held by American Mutual. *Id.* at p. 10. Yet the court incorrectly states that the money placed in the escrowed contingent balance fund under the agreement between American Mutual and the Association was to be retained by the insurance company "both *to cover unexpected losses* and to help stabilize dividend return." *Id.* at p. A-4 (emphasis supplied). On this basis the court of appeals reversed the jury award to the Association of sums contained in the contingent balance fund at the time this action was commenced. The amount of this award was $145,292. *No* evidence in the trial record supports the court of appeals' determination.

The Plan, as agreed to by American Mutual and the Association, contained a provision that specifically provides that the contingent balance was held in escrow. The testimony at the trial made clear that the contingent fund was reluctantly agreed to by the Association only on the basis that the contingent fund be escrowed and that it belonged to the Association.

The amount annually added to the contingent balance fund was based on a specific formula contained in the Plan. No provision was included in the agreement at any time allowing American Mutual to use the amounts contained in the contingent balance fund for unexpected losses. In fact, the agreement provided the money could only be used to stabilize dividends. There is no basis in the trial record for the court of

appeals' conclusion that the parties agreed that this fund was available to American Mutual to cover unexpected losses.[3]

c. **The court of appeals' determination that the issue of contract termination was not litigated ignores the findings of the jury.**

The court of appeals erroneously suggests that the Association had no right to terminate the group plan because the contract was silent as to termination. Appendix at p. A-10. This holding is in direct conflict with both the court of appeals' own decisions and those of the Minnesota Supreme Court. In Minnesota if the contract is silent on termination, as the parties' agreement is, then *both* parties have a concurrent right of termination. *W. K. T. Distributing Company v. Sharp Electronics,* 746 F.2d 1333, 1335 (8th Cir. 1984); *Benson Cooperative Creamery Assn. v. First District Assn.,* 276 Minn. 520, 151 N.W.2d 422, 426 (1967). The parties agreed and the trial court ruled that this is the applicable law. There is no rational reason or authority why one party to the contract found here by both the jury and the court of appeals should have the absolute right of termination and the other only the right to withdraw.[4]

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[3] By finding that the contingent balance fund was available to cover losses the court of appeals effectively guaranteed that the participants of the group plan will never receive one penny of the monies contained in the contingent balance fund. Following the Association's termination of the Plan, American Mutual consistently took the position that these monies were used to cover losses and that no money remained in the contingent balance fund.

[4] Petitioner is frankly confused by the court of appeals' ruling that the Association may recover $92,544 for breach of contract yet it has no right to terminate the group's contractual relationship with American Mutual. In effect the court has held that the Association is entitled to interest on money it does not own.

In sum, the court of appeals' failure to properly apply any stated standard of review to the jury's factual determination that American Mutual breached its fiduciary obligation to the Association and thereby reversing the jury finding, violates petitioner's Seventh Amendment right to jury trial.

### 2. The Holding Of The Court Of Appeals That The Issue Of Fraud Was Not Submitted To The Jury Contravenes Rule 49(a) Of The Federal Rules Of Civil Procedure.

Rule 49(a) of the Federal Rules of Civil Procedure provides that the trial court will give the jury explanations and instructions concerning matters submitted to jury as may be necessary for the jury to make a finding of fact on each issue. If the court omits any issue of fact a party waives his right to trial by jury of that factual issue unless the party demands its submission to the jury. As to such an omitted issue the trial court may make a finding and if it fails to do so, a finding in accordance with the judgment on the special verdict shall be deemed made by the court. FED. R. CIV. P. 49(a) (West 1968).

The court of appeals states in its opinion, "[B]ecause the only cause of action submitted to the jury was based on breach of contract, we are concerned only whether the *same actions* constituting the breach also constitute the independent tort of fraud." Appendix at p. A-12 (emphasis supplied). Unfortunately the court does not explain why it does not believe the fraud issue was submitted to the jury. Regardless of this lack of explanation no supportable basis exists for the court of appeal's determination that the issue of fraud was not submitted to the jury.

It is settled law in Minnesota that an award of punitive damages must be based on a separate cause of action and cannot be awarded for breach of contract. *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 51-52 (1983); *Jacobs v. Farmland Insurance Company*, 352 N.W.2d 803, 807 (Minn. Ct. App.

1984). The court of appeals mystically alludes to "certain actions of the company [that] might have given rise to separate tort liability and potentially to punitive damages . . . ." Appendix at p. A-13. The jury was well aware of the extent of the company's actions and properly registered its response to those actions in the special verdict.

The misrepresentations of American Mutual's representative, Joe Penn, constitute the activities or "actions" upon which the fraud count in this case is based. Mr. Penn knowingly misrepresented and concealed the amount of money wrongfully withheld from dividends by American Mutual.

The jury had before it uncontradicted testimony and evidence that Mr. Penn, over a number of years, repeatedly lied to the Association about the amount of the withheld funds. As an agent for the Association, such conduct clearly constitutes a fraudulent breach of American Mutual's fiduciary duty. Because of Mr. Penn's representations, American Mutual wrongfully gained the use of the excess funds at a time when interest rates were at an all time high.

The court of appeals awarded to the Association the interest that was earned on the wrongfully withheld funds. Basic common sense dictates that the fraud, which was the basis for part of the jury's award, cannot be ignored.

American Mutual's mere establishment of the dividend stabilization fund in contravention of the parties' agreement is clearly different from Mr. Penn's misrepresentations pertaining to the total amounts withheld and his willful coverup of the existence of this second dividend stabilization fund. The court of appeals erroneously overlooked this distinction; the trial court and the jury did not.

Contrary to the conclusion of the court of appeals, separate causes of action were submitted to the jury for its determination. The jury was instructed, at American Mutual's request, on the issue of fraud. At the time of the fraud instruction,

American Mutual asked for and received several additions to the fraud instruction. Clearly, American Mutual's requests must be viewed as a demand for the submission of the fraud issue to the jury under Rule 49(a). Compare *Molex, Inc. v. Nolen*, 759 F.2d 474, 478 (5th Cir. 1985) (under Rule 49(a), failure to request submission of an issue or to object to the absence of an issue in the special verdict form given to the jury bars assignment of error on that factual issue).

The trial court specifically submitted the issue of fraud to the jury when it stated, "I asked you question 5, 'Was there *fraud* or breach of trust?' "

Nothing more clearly demonstrates that the issue of fraud was submitted to the jury than the special verdict form itself, set forth in the margin in its entirety.[5]

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[5] **SPECIAL VERDICT FORM**

QUESTION 1. Was there an agreement between the Minnesota Timber Producers Association and American Mutual Insurance Company which controlled the individual policies issued?

ANSWER: Yes
(Yes or No)

QUESTION 2. If you answered Yes to Question 1, was the contract breached by defendant American Mutual Insurance Company?

ANSWER: Yes
(Yes or No)

QUESTION 3. If you answered Yes to Question 2, was the plaintiff Minnesota Timber Producers Association damaged as a result of the breach?

ANSWER: Yes
(Yes or No)

QUESTION 4. If you answered Yes to Questions 1, 2 and 3, what amount of money would properly compensate the plaintiff Minnesota Timber Producers Association

The breach of contract cause of action is contained in questions 1 through 4 of the special verdict form. Questions 2, 3, and 4 are predicated on the jury's answering question 1 in the affirmative.

Question 5 presented the jury with the question of whether the activities of American Mutual constituted fraud or breach of trust. It was not necessary for the jury to answer any other question on the special verdict form in order to determine whether the Association had proven its tort count. Question 5 represents a cause of action separate from the breach of con-

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for its actual damages directly arising from said breach?

ANSWER: $237,836.00 (number)
Two hundred thirty seven thousand eight hundred thirty six dollars (amount in words)

QUESTION 5. Did the activities of defendant American Mutual insurance Company constitute fraud or a breach of trust?

ANSWER: Yes
(Yes or No)

QUESTION 6. If you answered Yes to Question 5, was the conduct of the defendant American Mutual Insurance Company so willful or malicious so as to warrant punitive damages?

ANSWER: Yes
(Yes or No)

QUESTION 7. If you answered Yes to Question 6, what amount of damages should properly be awarded as punitive damages?

ANSWER: $1,000,000.00 (number)
One million dollars (amount in words)

Dated 4-13-84

Signed Thomas J. Hankins
Foreperson of the Jury

tract action and the jury found in favor of Association on the tort cause of action.

Question 6 of the special verdict relates to the cause of action based on tort and has no application to questions 1 through 4 relating to breach of contract. Question number 7 is predicated on the answering of both question 5 and question 6 in the affirmative and it also has absolutely no application to questions 1 through 4 of the special verdict form.

American Mutual did not object to the special verdict form. In fact, American Mutual actively participated in drafting this special verdict form. The issue of fraud was argued by counsel to the jury.

The special verdict form was simple, clear, and concise and left no room for confusion on the part of the jury. *Dobbs v. Gulf Oil Co.*, 759 F.2d 1213, 1215-16 (5th Cir. 1985). The form of the special verdict is for the trial judge to determine and may only be reviewed for abuse of discretion. *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780, 789 (D.C. Cir. 1982).

Evidence supports each of the jury's findings in the special verdict. As an American Mutual Accounts Representative, Mr. Penn clearly had nothing to do with the establishment of the second "dividend stabilization fund" by American Mutual's board of directors. Moreover, he did not participate in establishing the original agreement. All evidence and testimony relating to the misrepresentations of Joe Penn were introduced at trial for the specific and obvious purpose of establishing tortious conduct based on fraud or breach of fiduciary obligation.

Rule 49(a) of the Federal Rules of Civil Procedure is intended to fill any gaps left by inconsistent or incomplete findings of fact by the jury's answers to the special verdict. See J. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245, 349 (1968). The Rule mandates that the court of appeals review the record and determine that *no* possible view of the case exists

which will support the jury finding before it may dismiss that finding. The court of appeals has failed in its duty.

Rule 49(a) is analagous to Rule 49(b) pertaining to general verdicts with accompanying interrogatories. This Court and numerous lower courts have recognized, for example, that Rule 49(b) of the Federal Rules of Civil Procedure requires a reviewing court to attempt to harmonize inconsistent answers to interrogatories accompanying general verdicts. See, e.g., *Gallick v. Baltimore & Ohio Railway Company,* 372 U.S. 108 (1963); *A & G Stevedores v. Ellerman Lines,* 369 U.S. 355 (1962); *Julien J. Studley, Inc. v. Gulf Oil Corp.,* 407 F.2d 521 (2nd Cir. 1969).

In *A & G Stevedores,* this Court stated that "to search for a possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *A & G Stevedores,* 369 U.S. at 364. To avoid a finding of inconsistency the reviewing court must attempt reconciliation "by exegesis if necessary." *Gallick,* 372 U.S. at 119. No less a standard should apply when reviewing jury findings under Rule 49(a).

In *Muldrew v. Anheuser-Busch, Inc.,* 726 F.2d 989 (8th Cir. 1984), the court of appeals stated that an appellate court cannot reject a jury's finding of fact unless the court is left with a firm and definite conviction that a mistake has been committed. *Id.* at 992-93. In this action, the jury made no mistake. There is substantial evidence in the record to support all of the jury's findings that American Mutual's activities constituted fraud. More importantly there is *not* one piece of evidence or testimony refuting the fraud. Furthermore, the court of appeals' determination that the issue of fraud was not submitted to the jury is in direct contravention of Rule 49(a) of the Federal Rules of Civil Procedure. See *Jacobs v. Farmland Mutual Insurance Co.,* 352 N.W.2d 803, 807 (Minn. Ct. App. 1984) (court holds that the finding of fraud was *implicit* in the jury's verdict).

## CONCLUSION

As this Court recently cautioned, "the trial should be the 'main event' . . . rather than a 'tryout on the road.' " *Anderson v. City of Bessemer,* ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985). The court of appeals has recognized as a matter of legal principle that a jury verdict should not be reversed so long as "evidence reasonably or fairly tends to sustain it." *Rochester Civic Theatre v. Ramsay,* 368 F.2d 748, 753 (8th Cir. 1966). In this case not only does substantial evidence exist in the record to support all of the jury's determinations, there is *no* testimony contradicting the jury findings. The jury, after hearing the evidence and following careful instructions, completed a detailed special verdict form. The effect of the court of appeals' decision is to emasculate the jury findings and verdict.

Petitioner respectfully submits that the court of appeals has improperly applied the standard of review to the facts of this case. The court has erroneously reweighed the evidence and thereby substituted its judgment for that of the jury. *Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959). Such review contravenes the rulings of this Honorable Court. See *A & G Stevedores v. Ellerman,* 369 U.S. 355 (1962); *Lavender v. Kurn,* 327 U.S. 645 (1946).

As stated by Justice Black in *Neely v. Martin K. Eby Construction Company,* 386 U.S. 317 (1967), if:

> [t]he court of appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment, and certainly this is the kind of plain constitutional error that this Court can and should correct.

*Id.* at 332 (Black, J., dissenting).

The recent case *Anderson v. City of Bessemer, supra,* provided this Court with an opportunity to clarify the "clearly er-

roneous" standard of appellate court review under Rule 52. Moreover, numerous Supreme Court decisions have construed the relationship between the Seventh Amendment, special interrogatories and general verdicts under Rule 49(b).

Few pronouncements by this Court, however, have touched upon the legal guidelines contained in Rule 49(a) of the Federal Rules of Civil Procedure and no decision of this Court has directly interpreted the commands of Rule 49(a). This case presents a unique opportunity for this Court to clarify and construe the mandate of this important rule.

The court of appeal's decision substantially departs from the mandates of the Seventh Amendment to the United States Constitution and Rule 49(a) of the Federal Rules of Civil Procedure. If left to stand, the present decision is inconsistent, contradictory, and contrary to applicable law. For these reasons, petitioner Minnesota Timber Producers Association respectfully requests that its Petition for a Writ of Certiorari be granted.

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# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 84-5113

---

Minnesota Timber Producers
Associations, Inc.,
Appellee,

v.

American Mutual Insurance
Company of Boston,
Appellant,

v.

Tom Evenson, James Hall,
Thomas McCabe, Clayton
Peterson, and John Peterson,
Appellees/Intervenors.

Appeal from the United
States District Court for
the District of Minnesota.

---

Submitted: December 11, 1984

Filed: July 11, 1985

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Before HEANEY, ROSS, and FAGG, Circuit Judges.

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FAGG, Circuit Judge.

American Mutual Insurance Company of Boston (American Mutual or Company) appeals from an adverse jury verdict rendered in favor of the Minnesota Timber Producers Association, Inc. (MTPA or Association). Three issues are presented by this appeal. First, did American Mutual and the Association enter into a contract establishing the terms and conditions of a group worker compensation insurance program? Second, if such a contract was entered into, did American Mutual breach the terms and conditions of this contract by unilaterally altering the operation of the group program? Third, if American Mutual breached this contract, did the actions constituting the breach also constitute fraud or a breach of fiduciary duty and thus support an award of punitive damages?

Following trial, the jury concluded that American Mutual and the Association had entered into a contract and that this contract controlled the terms and conditions of a group worker compensation insurance program. The jury also concluded that American Mutual breached this contract and that this breach constituted either fraud or a breach of fiduciary duty. On the basis of these findings, the jury awarded the Association $237,836 in compensatory damages and $1,000,000 in punitive damages. We affirm in part and reverse in part.

The MTPA is a nonprofit Minnesota corporation which actively represents many Minnesota timber producers. In the late 1960s and early 1970s, the Association began to explore the possibility of establishing a group worker compensation insurance program for its members. In June of 1972, the Association's insurance committee met with representatives of American Mutual to discuss the possibility of establishing such a program for the members of the MTPA.

These discussions centered around the creation of a worker compensation "safety group." This safety group would be made up of qualifying timber producers who, through a defined program of accident prevention and loss control, would work with American Mutual's engineers and safety experts to reduce

the overall cost of worker compensation insurance. The savings realized by these efforts would be returned to the individual members of the group in the form of a "dividend." The dividend received by any individual participant would represent that participant's pro rata share of the money remaining after losses, charges, and other costs were deducted from the total group premium collected in that particular year.

Following these discussions, American Mutual presented the insurance committee with what it termed a "Proposal for Insurance Coverage." This proposal embodied the parties' previous discussions and detailed specifically both how the safety group would be established and how the group would operate. The proposal also sought the endorsement of the Association and provided that once the Association agreed to endorse American Mutual's plan, American Mutual would solicit directly the members of the MTPA. Timber producers who joined the safety group would receive individual insurance policies from American Mutual, and when a minimum of fifteen members and $50,000 in annual premiums had been enlisted, the insurance plan as outlined in the "Proposal for Insurance Coverage" would go into effect.

The American Mutual proposal also detailed how the yearly dividend would be determined. The proposal provided that the dividend would be established by the American Mutual board of directors through the applicaiton of the Company's "dividend guideline rules." The dividend guideline rules were made a part of the American Mutual proposal.

These rules provided that all premiums paid to the Company by the safety group for any one year would be pooled. From this total pool of premiums, administration charges, insurance charges, and losses would then be deducted. After these deductions were made, a portion of the remaining balance (the gross dividend) could, in the discretion of American Mutual's board of directors, be placed in a contingent balance fund.

The money placed in this fund was to be retained by the Company both to cover unexpected losses and to help stabilize dividend return. The amount that could properly be retained by the Company, however, was specifically limited to the following amounts:

(1) 20% of the first $100,000 in yearly premiums could be placed in the fund;

(2) 15% of the next $400,000 in yearly premiums could be placed in the fund; and

(3) 10% of amounts over $500,000 in yearly premiums could be placed in the fund.

After allowing for any permissible amount that might be placed in the contingent balance fund, the dividend guidelines rules provided that the amount remaining was to be "available" for distribution as a dividend. No other contingent fund was provided or allowed for by the proposal.

After receiving the proposal, the Association and American Mutual discussed various aspects of the proposal and its operation. These discussions focused primarily on the contingent balance fund, to which the Association was initially opposed. The Association, however, eventually agreed to accept the contingency fund as presented in American Mutual's proposal. Apparently, two primary factors persuaded the Association to accept the establishment of this fund. First, the amount of money that could be placed in the fund was subject to specific, well defined limitations. Second, the money placed in the fund would, in the event that the group was terminated, be distributed to the plan's participants.

In December of 1972, the MTPA board of directors agreed to endorse the American Mutual proposal. Following this endorsement, American Mutual began to solicit potential plan participants. Within a few months, the minimum number of participants and premiums had been reached and the plan was placed into effect.

Between 1973 and 1978, the plan grew steadily and proved quite successful. The Association and American Mutual worked closely together and each took an active role in dealing with and correcting any problems that arose. During that period, over $1,000,000 in dividends were returned to the plan's participants which, beginning in 1974, included both MTPA members and non-MTPA members. On the whole, the insurance group was operated and administered as had been presented in the American Mutual proposal.

In November of 1978, the American Mutual board of directors modified the Company's national worker compensation plan. This plan, which was adopted by the Company in 1963, established the Company's guidelines with respect to its many worker compensation safety groups. Although American Mutual's 1972 proposal to the Association was based on this plan, it appears (and the jury could have found) that the Association was not made aware of the existence of this national plan during the formation of the MTPA/American Mutual safety group.

While several modifications to this national plan were made by the American Mutual board of directors, the modification most relevant to this action authorized the board to create a second type of contingency fund, a dividend stabilization fund. This fund, when actually established for a particular safety group, would enable the Company to retain (for a limited time) amounts over and above those authorized to be placed in the contingent balance fund by the dividend guideline rules. While the American Mutual proposal had specifically provided for a contingent balance fund, it did not provide for or anticipate the establishment of any additional contingency fund.

In February of 1979, the Company's board of directors, in determining the MTPA 1978 dividend, applied these modified national rules to the Association's safety group and placed $219,782 in the dividend stabilization fund. In late 1979 or early 1980, the directors, in determining the MTPA 1979 dividend,

placed $165,819 in the dividend stabilization fund. In 1980 and 1981, these amounts were returned to the members of the safety group pursuant to the Company's modified national rules. The Association learned of these actions only after the present lawsuit had begun.

In 1981, for a variety of reasons, MTPA revoked its endorsement of the American Mutual plan. Following this revocation, the Association took the position that the removal of its endorsement terminated the safety group as a whole and requested that American Mutual return the money it then held in the contingent balance fund. American Mutual refused, taking the position that the withdrawal of the Association's endorsement had no effect on the operation of the safety group. This litigation followed.

In its complaint, the Association asserted a variety of claims centering around breach of contract, breach of fiduciary duty, fraud, and breach of warranty. Initially, the controversy focused on the Association's right to terminate the insurance group and by that means obligate American Mutual to return the money retained by it. At trial, however, the central issue became whether any type of contractual agreement existed between the parties and whether American Mutual breached any such agreement through the creation of the dividend stabilization fund. A further issue became whether the creation of this fund not only breached a contractual agreement but whether the same actions constituting the breach also constituted fraud or a breach of fiduciary duty and would support an award of punitive damages for the breach of contract.

Three central issues were submitted to the jury. First, did a contract exist? Second, was that contract breached? Third, did the breach constitute fraud or a breach of a fiduciary duty and as such support an award of punitive damages? A separate fraud count based on asserted misrepresentations of one of American Mutual's employees was not submitted to the jury.

Also, the issue of whether the Association could properly terminate the group was not submitted to the jury. As indicated, the jury answered all three issues submitted to it affirmatively and awarded $237,836 in compensatory damages and $1,000,000 in punitive damages. This appeal followed.

The first issue to be addressed is whether a contract establishing the terms and conditions of a group insurance program was entered into between American Mutual and the Association. Because this case is brought in diversity, we look to the substantive law of Minnesota in making our decision. In Minnesota, the existence and terms of a contract are for the jury. *McEwen v. State Farm Mutual Insurance,* 281 N.W.2d 843, 845-46 (Minn. 1979); *Swanson v. American Hardware Mutual Insurance Co.,* 359 N.W.2d 705, 708 (Minn. App. 1984). We must review the evidence presented at trial in the light most favorable to the prevailing party, and the verdict will not be reversed "if the evidence reasonably or fairly tends to sustain it." *Lesmeister v. Dilly,* 330 N.W.2d 95, 100 (Minn. 1983). *See also DeWitt v. Brown,* 669 F.2d 516, 523 (8th Cir. 1982), and *Hanson v. Ford Motor Co.,* 278 F.2d 586, 589-90 (8th Cir. 1960) (Where the state and federal tests for sufficiency of the evidence are similar and neither party has raised an issue with respect to which test should be applied, the state test is controlling.). Here, after carefully reviewing all the evidence, we conclude that the jury could reasonably have found that a contract establishing the terms of a group worker compensation insurance program had been entered into by American Mutual and the Association.

The American Mutual proposal followed a series of discussions, the specific focus of which was the establishment of a group worker compensation insurance program. The proposal presented by American Mutual outlined in significant detail how the plan was to operate and in particular how dividends were to be established. After the Association agreed to and endorsed the terms of the American Mutual proposal (exactly as presented), the plan was implemented by both parties and, ex-

cept for minor modifications that were agreed to by both parties, operated precisely as intended for five years. During this period, both the Association and American Mutual were actively involved in the plan and worked closely together in making the plan a success. Given this evidence, we cannot say that a jury, considering not only the documentary and testimonial evidence but also considering all the surrounding facts and circumstances in the context of the entire transaction, *see Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 149 N.W.2d 31, 35 (Minn. 1967), could not reasonably conclude that in return for the Association's endorsement and active participation American Mutual agreed to abide by the terms and conditions set out in its proposal.

Once we conclude that a contract existed between the parties, we must next determine whether this contract was breached by American Mutual. The Association asserts that American Mutual breached the contract when it unilaterally applied the modified national rules to the Association's safety group and established a second contingent fund, the dividend stabilization fund. The jury accepted the Association's position, and we cannot say that its conclusion is without substantial support.

The American Mutual proposal allowed for the creation of a single fund, the contingent balance fund. The proposal also specifically limited the amount of money that could be placed in this fund. Under the proposal, all other money remaining was to be "available" for dividends. In light of the parties' extensive negotiations on this point and in light of the Association's express concern over the amount of money to be retained, the jury could reasonably find that under the terms of the parties' agreement all money not placed in the contingent balance fund was to be returned as dividends. Therefore, when American Mutual unilaterally created a second fund and retained money that otherwise would have been returned, it breached its agreement with the Association and became liable for damages caused by this breach.

As compensatory damages for this breach, the jury awarded the Association $237,836. Although indirectly, American Mutual attacks the amount and composition of this award. While the jury did not specify the basis for this amount, it appears (and the parties agree) that the award is made up of two basic components: (1) interest on the money wrongly retained by American Mutual in the dividend stabilization fund; and (2) money held by American Mutual in the contingent balance fund at the time the Association filed its amended complaint. We conclude that only the first of these two awards was appropriate.

In its instructions, the district court told the jury that between six and twelve percent interest could be awarded on the money improperly retained (although subsequently returned) by American Mutual. Assuming that the jury awarded the Association twelve percent simple interest on the money improperly retained ($219,782 was improperly retained from 1978 to 1980 and $165,819 was improperly retained from 1979 to 1980), only $92,544 should have been awarded. This amount properly compensates the Association for the loss, and the jury's award is affirmed to this extent.

With respect to the money awarded by the jury from American Mutual's contingent balance fund ($145,292), we reverse. The money held by the Company in its contingent balance fund could only have been awarded to the Association if the jury found that the withdrawal of the Association's endorsement effectively terminated the safety group. This issue, however, was not submitted to the jury. Hence, the money held by the Company at the time the Association filed its amended complaint cannot provide a basis for recovery.

However, even if this issue had been submitted to the jury, we do not believe the jury could reasonably have found that the Association's withdrawal terminated the safety group. While the possibility that the group might at some time be terminated was anticipated, specifics such as how the group would be ter-

minated, who could terminate the group, and under what circumstances the group could be terminated, were not discussed by the parties and were not made a part of either the American Mutual proposal or the parties' agreement. Accordingly, the Association had no contractual right or authority to terminate the group. Rather than result in the group's termination, we conclude that the Association's withdrawal of its endorsement simply ended its contractual relationship with American Mutual and absolved both parties of further performance under the terms of the agreement. As a result, while we affirm the jury's award of compensatory damages to the extent necessary to compensate the Association for the lost use of the money improperly retained by American Mutual ($92,544), we reverse the jury's award to the extent it included money held by the Company at the time that MTPA filed its amended complaint ($145,292).

In reaching this result, however, we express no opinion on the issue of termination itself. Both parties agree that the contingent balance fund belongs to the participants of the plan and that upon termination of the insurance group those participating in the group will be entitled to a full accounting and to the return of the funds held by the Company. Our decision in this action has no effect on and in no way lessens this underlying obligation on the part of the Company.

We turn next to the jury's award of punitive damages. Under Minnesota law, a plaintiff may recover punitive damages "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." MINN. STAT. ANN. § 549.20 More specifically, in a contract action punitive damages are not available "except in exceptional cases where the breach is accompanied by an independent tort." *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52 (Minn. 1983); *Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 452 (Minn. 1980). In fact, only in cases in which "the breach has resulted from an independent or willful tort and the defendant acted with malice" will punitive damages be recoverable in a contract action. *Cherne Industries, Inc. v.*

*Grounds & Associates,* 278 N.W.2d 81, 95 (Minn. 1979); *see also Wild v. Rarig,* 234 N.W.2d 775, 789-90 (Minn. 1975), *cert. denied,* 424 U.S. 902 (1976). Malicious and willful breach is not enough to give rise to punitive damages in a contract action and goes only to the issue of whether a material breach has occurred. It is only if the willful and malicious conduct itself constitutes an independent tort as well as a breach of contract that punitive damages will be available. *Barr/Nelson,* 336 N.W.2d at 52-53.

In the present action the Association has asserted two grounds in support of the jury's award of punitive damages. First, it asserts that the Company's conduct breached a fiduciary duty owed to the Association. In the alternative, the Association argues that this conduct constituted fraud. We reject both of these assertions.

We address first the issue of whether or not a fiduciary relationship existed between American Mutual and the Association. We emphasize that we are dealing only with the relationship existing between American Mutual and the Association. We are not concerned with whether any type of fiduciary relationship might exist between American Mutual and the members of the safety group who actually purchased the worker compensation insurance. This issue was never litigated, and it is clear from the record that the question of a fiduciary relationship submitted to the jury involved only the relationship between American Mutual and the Association.

Under Minnesota law, "[a] fiduciary relationship exists 'when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.' " *Toombs v. Daniels,* 361 N.W.2d 801, 809 (Minn. 1985) (quoting *Stark v. Equitable Life Assurance Society,* 285 N.W. 466, 470 (Minn. 1939)). Other factors, such as disparity in business experience and greater access to facts and legal resources, may also, when combined with a confidential relationship, give rise to a fiduciary relationship.

*Id.* Reviewing the evidence presented in light of these factors, although the existence of a fiduciary relationship is a question of fact and normally for the jury, *see Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976), we conclude as a matter of law that no such relationship existed between the Association and American Mutual.

In its essence, this is a contract action. The parties dealt with each other on an arm's length basis and there is no evidence that any type of fiduciary relationship was intended or in fact that any type of confidential relationship existed between American Mutual and the Association. Further, the Association made no showing that American Mutual enjoyed superior or excessive influence over the Association. Rather, the only evidence pointed to by the Association is a statement by an officer of the Association that they "trusted" American Mutual. We conclude as a matter of law that no fiduciary relationship existed between the parties.

We next address the issue of fraud. In so doing, we are not concerned with whether separate and apart from the acts constituting the breach certain actions of American Mutual were themselves fraudulent. Rather, because the only cause of action submitted to the jury was based on breach of contract, we are concerned only with whether the same actions constituting the breach also constitute the independent tort of fraud. *Barr/Nelson*, 336 N.W.2d at 52; *Cherne*, 278 N.W.2d at 95; *Rarig*, 234 N.W.2d at 789-90. Given this focus, we conclude that the breach of contract did not constitute fraud.

The actions taken by the Company were taken in the belief that they had the right to apply the modified national rules to the Association's safety group. By so doing, the Company breached its contract with the Association. The acts constituting the breach, however, did not violate any independent duty (fiduciary or otherwise) owed by American Mutual to the Association and did not constitute fraud or any other independent tort. Consequently, while separate and apart from the breach, certain actions of the Company might have given rise to

separate tort liability and potentially to punitive damages, the actions constituting the breach do not. Thus, the jury's award of punitive damages for breach of contract was improper and must be reversed.

We affirm the jury's conclusion that a contract existed and that this contract was breached. We also affirm the jury's award of compensatory damages to the extent necessary to compensate the Association for the lost use of the money improperly retained ($92,544). However, we reverse the remainder of the jury's compensatory damages award and the jury's award of punitive damages.

Affirmed in part and reversed in part.

ROSS, Circuit Judge, dissenting.

I dissent because I do not believe that, as a matter of law, there was ever a contract between Minnesota Timber Producers Association and American Mutual Insurance Company.

In the magistrate's opinion he carefully sets forth the reasons for his finding that there was no contract which the Association had standing to enforce. I agree with these reasons and note that the facts clearly show as follows:

1. There was no formal written contract between the Association and American Mutual.

2. The Association was not a party to the written insurance policy contracts between the members and nonmembers of the Association and American Mutual. It did not claim to be a party to a contract with American Mutual for several years after the policies were issued.

3. Dividends in excess of $3.4 million were paid direct to the individual policyholders rather than to the Association.

4. Cancellation rights were provided in the individual policies of each member and nonmember of the Association.

5. The plan eventually included both members and nonmembers of the Association. It is not clear to me how the Association intends to distribute the money or under what theory they are being permitted to collect on behalf of the nonmembers of the Association.

In my opinion, the documents and the testimony received in this case do not show the existence of any contract between the Association and American Mutual. I agree with the balance of the reasoning of the majority opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**JUDGMENT**

No. 84-5113MN

September Term, 1984

Minnesota Timber Producers Assn, Inc.
Appellee

vs.

American Mutual Insurance Co.,
Appellant,

vs.

Tom Evenson, et al,
Appellee/Intervenor.

Appeal from the United States
District Court for the
District of Minnesota

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in part and reversed in part in accordance with the opinion of this Court.

July 11, 1985

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5113-MN

Minnesota Timber Producers
Associations, Inc.,
Appellee,

vs.

American Mutual Insurance
Company of Boston,
Appellant.

Appeal from the United States
District Court for the
District of Minnesota

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 20, 1985

## APPENDIX D

### Trial Exhibit (Summary of MTPA-AM Plan)

IV. DIVIDEND GUIDELINE RULES

A.

**THE PLAN**

**Basic Premium**

24

&

B.

**LOSSES**

1. Incurred during year (Valued six months after expiration)
2. Plus or minus changes in preceeding year's reserves.

C.

&

**INSURANCE CHARGE**

1. To protect the company against catastrophe losses since the plan provides for no surcharge.
2. Decreases as the contingent balance in escrow increases.

| IF CONTINGENT BALANCE IS: | INSURANCE CHARGE IS: |
|---|---|
| 0% | 7% |
| 5% | 5% |
| 10% | 3½% |
| 15% | 2½% |
| 20% and over | 2% |

D. Balance available for Contingent Balance and Dividends.

E. Allocated to Contingent Balance.

1. Stabilizing fund - to establish dividend returns.

2. Dollars belong to Association, not to Insurance Co.

3. 25% of "D" until balance equals 20% of annual premium - at $ 100,000 or 17.5% at $ 200,000 as follows:

| | | |
|---|---|---|
| First | $ 100,000 | 20% |
| Next | $ 400,000 | 15% |
| Over | $ 500,000 | 10% |

F. Remainder available for dividend distribution.

BEST AVAILABLE COPY

(2)

No. 85-813

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

*Petitioner,*

*vs.*

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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58pp

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*Huddleston* v. *Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983) ..... 20

*Magnum Import Co.* v. *Coty*, 262 U.S. 159 (1923) ..... 14

*Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924) ..... 14

### United States Constitution Cited

Seventh Amendment ..... 12

### Rule Cited

Rule 49(a), Fed. R. Civ. Pro. ..... 12, 13, 17

No. 85-813

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

*Petitioner,*

*vs.*

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Mutual Insurance Company of Boston ("American Mutual") respectfully requests that the petition for a writ of certiorari by Minnesota Timber

Producers Association, Inc. ("MTPA") be denied because petitioner is asking this Court to add to its crowded docket a contract action between private parties which presents no issues of paramount public importance and which was tried in federal court only because of diversity jurisdiction.*

## Opinions Below

Nowhere in its petition has MTPA acknowledged that on American Mutual's motion for summary judgment to dismiss this action, U.S. Magistrate Patrick McNulty had issued a comprehensive Memorandum Decision and Recommendation dated September 20, 1983 recommending that this case be dismissed. Without a written decision and by Minute Order dated December 8, 1983, the District Court (Miles W. Lord, C.J.) reversed and vacated the Magistrate's recommendation. The Memorandum Decision and Recommendation of the Magistrate is reproduced as Respondent's Appendix A at pages RA-1 to RA-23; the District Court's Minute Order is reproduced as Respondent's Appendix B at pages RA-24 and RA-25. The opinion of the Eighth Circuit Court of Appeals is reproduced as Petitioner's Appendix A at pages A-1 to A-14 of the petition.

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* We note that the petition has been filed on behalf of the MTPA only, although the named intervenors have been represented by the same counsel as MTPA.

## Statement of the Case

Since a comprehensive review of the factual record demonstrates that this case does not warrant plenary review by this Court, and petitioner has chosen to ignore substantial parts of the record and to over-simplify the facts in its petition, American Mutual has included the statement of the case set forth below.

### 1. American Mutual's National Safety Group Dividend Plan.

Although completely ignored by petitioner in its petition, approximately ten years before American Mutual proposed to insure Minnesota loggers as a safety group, American Mutual's Board of Directors had adopted its Safety Group Dividend Plan ("National Plan") under which more than 100 separate safety groups had been established. (PMX-10, B-4)* Under the National Plan, the Board of Directors could vote to establish for dividend purposes separate classifications (known as "safety groups") for policy holders engaged in the same business or profession who participate in a defined program for actively promoting accident prevention and loss control. (DX-34, B-88-90) By such groupings, American Mutual sought to direct specialized safety programs and activities to these policyholders, and to pass on to the individual employers through the opportunity for increased policy dividends, a portion of the cost savings achieved by the safety program. (*Id.*)

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* Unless otherwise noted, all references are to the record on appeal before the Eighth Circuit.

Under the Rules of the National Plan (the "National Rules"), American Mutual issued individual policies with a common expiration date to each policyholder within a particular safety group. The National Rules contained guidelines for determining the dividend (DX-34, Part C, B-91-93), but the actual dividend rate, expressed as a percentage of the premiums paid by the policyholders classified in a particular safety group, was set by American Mutual's Board of Directors by separate vote for each safety group. (*Id.*)

In determining the amount available for distribution as dividends, certain deductions, including amounts allocated to a contingent balance,* were first taken from the total premium paid by policyholders in the safety group. The remaining amount would be available for such dividends as American Mutual's Board of Directors, in its discretion, decided upon.

The amount allocated to the contingent balance was subject to limitations specified in the National Rules. If the safety group's applicable charges (expenses and losses) exceeded the premium paid by the policyholders during a policy year, monies in the contingent balance would be used to cover the amount of the deficiency. (DX-34, Part C, B-91-93) Upon termination of a safety group dividend classification by American Mutual's Board, the contingent balance, as adjusted, and subject to the determination of the Board, would be distributed to eligible policyholders. (DX-34, Part C IV, B-93)

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* The contingent balance consisted of a portion of the total premium remaining after deduction of losses and expenses which was set aside for unanticipated losses. (B-93)

In 1978 American Mutual's Board of Directors amended the National Rules in order to minimize fluctuations in the size of dividends paid from year to year. (DX-35, B-102) If a projected dividend rate for a safety group exceeded 35% of the total premium paid, the amount in excess of 35% was deferred and placed in a dividend stabilization fund, from which it could be distributed two years later. (B-108)*

**2. American Mutual's insurance of Minnesota loggers.**

In 1972, American Mutual sought to establish a safety group for loggers in Minnesota. By letters dated July 12 and July 28, 1972, American Mutual's representative wrote to two MTPA executives seeking MTPA's endorsement. (PMX-10, B-3, and PMX-12, B-16) Enclosed were separate and non-identical letters and proposals which generally described the potential benefits of the National Plan for participating loggers and the advantages for MTPA in sponsoring it. (*Id.*) The proposals were included "[t]o assist you in discussing the plan with other officers and members . . . ." (PMX-10, B-7; PMX-12, B-16c) These materials made clear the individual nature of the solicitation and that individual insurance policies would be issued to each participant by American Mutual. (B-5-7, B-16c, B-16j)

In December 1972, MTPA's Board of Directors endorsed American Mutual's safety group plan. (PX-20, B-196)

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* In 1981 and 1982, American Mutual's Board of Directors further amended the National Rules. (DX-36 and 29, B-854, B-84)

After endorsement, American Mutual began to directly solicit the business of individual loggers. By July 1973, a sufficient number of loggers had purchased individual insurance policies to satisfy the requirements for establishing a separate dividend classification under the National Rules. (PX-28, B-211 and PX-42, B-247) Each individual insurance policy included a "Dividend Notice" stating that the policyholder was included in the Minnesota logger dividend classification and that:

> The named insured shall participate to the extent and upon the conditions fixed and determined by the Board of Directors after expiration of the policy in accordance with the provisions of law, in the distribution of dividends so fixed and determined for such classification.
>
> No representative of [American Mutual] is authorized to waive, or change the statement of dividend conditions applicable to this dividend classification. (DX-33, B-86)

In addition, the policies stated that

> . . . this policy embodies all agreements existing between [the policyholder] and the company or any of its agents relating to this insurance. (DX-33, Condition 17, B-83)

The Minnesota loggers safety group grew steadily, and by 1981 when MTPA withdrew its endorsement the annual premiums reached approximately $2 million. (B-709) During the time of MTPA's endorsement, American Mutual paid more than $3.3 million in dividends to policyholders in this safety group. (T-400-02) These dividends, which

MTPA conceded were "unheard of in past years" (B-338), when added to additional premium discounts received by those policyholders, averaged 45.3% of the total premium paid from inception of the safety group through 1981. (B-803)

### 3. MTPA's efforts to use the contingent balance to self-insure its members.

Despite this success and the expressed satisfaction of the policyholders with American Mutual and the safety group (*e.g.*, DX-18, B-64), in December 1979, because of steeply increasing state workers' compensation insurance rates and rising interest rates (T-371-72), MTPA's insurance committee, with the assistance of its present counsel, commenced a study regarding self-insurance for its members. (DX-15, B-55-59) MTPA viewed the funds in the contingent balance as a means of financing a self-insurance program or forming a captive insurance company (DX-17, B-62) and it began efforts to capture those funds.

By September 1980, MTPA's counsel asked American Mutual to provide information and documents relating to the contingent balance and the existence of any contractual relationship among American Mutual, the MTPA and/or individual policyholders relating to the contingent balance. (DX-140, B-521) After receiving a written response dated October 9, 1980, MTPA's counsel advised the insurance committee of American Mutual's position:

> 1. There is no contractual relationship with the [MTPA].
>
> 2. The group program is established by the board of directors of American Mutual and the plan rules

> as well as dividends can be changed at any time by the board.
>
> 3. The contingent balance monies are distributed after termination of the group by the company.
>
> 4. The withdrawal of the sponsorship by the association does not constitute termination of the group. (DX-17, B-62)

As also reported in the committee minutes, counsel—who had received a copy of the 1978 amended Rules of the National Plan as a part of American Mutual's October 9, 1980 response—concluded that "the contingency is totally in control of American Mutual and we cannot count on this money to help us to self-fund or form a captive." He described as "slim" MTPA's chances of prevailing in a lawsuit challenging American Mutual's position. (*Id.*)*

The MTPA insurance committee continued its consideration of self-insurance and discussed what concessions it could extract from American Mutual in exchange for continuing its endorsement. (DX-18, B-64) In addition, another insurer, Lumberman's Underwriting Alliance, expressed an interest in meeting with MTPA concerning

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* Neither MTPA's counsel nor any insurance committee member noted any exception, in the minutes or in a contemporaneous response, to American Mutual's clear statement that it had no contractual relationship with MTPA and that distribution of the contingent balance was subject to the determination of its Board of Directors. Further, neither MTPA nor its counsel asserted that the proposals forwarded in July 1972 constituted a binding contract. At trial, however, MTPA's witnesses, including one who was present at the insurance committe meeting, testified that the proposal was "our Bible" (Petersen, T-225) and "what we lived by." (Schneider, T-130)

workers' compensation insurance for its members. (DX-20, B-70)

At a meeting on March 19, 1981, after reviewing a written comparison prepared by its insurance committee of American Mutual's safety group plan and Lumberman's program, the MTPA Board of Directors endorsed the latter program. (DX-21, B-72, B-75, B-76)

The next day, MTPA advised American Mutual it was "terminating its sponsorship of the American Mutual Worker's Comp. Safety Plan." (DX-22, B-77) American Mutual promptly notified all its Minnesota logger policyholders that MTPA's withdrawal of sponsorship "in no way affects the continuation of our highly successful program." (DX-24, B-803) At that time, MTPA did not assert, to its members or otherwise, that withdrawal of its sponsorship automatically terminated the safety group.

In June 1982, more than one year later—and almost two years after American Mutual specifically advised MTPA that withdrawal of sponsorship did *not* terminate the safety group (PX-135, B-511, DX-16, B-66)—MTPA's counsel first told American Mutual that:

> . . . it is our law firm's legal position that the withdrawal of the Timber Producers from the safety group program constituted a termination of that program. (PX-185, B-702)

Although directly contradicting his firm's new "legal position," counsel also candidly admitted that American Mutual's October 9, 1980 letter together with the amended

1978 National Rules "substantially confirms the understanding of the various members of the Association." (*Id.* B-702)

**4. Proceedings below.**

In the District Court, on American Mutual's motion for summary judgment, the Magistrate found the proposals American Mutual had sent to MTPA in 1972 did not constitute a binding contract under Minnesota law because the individual insurance policies subsequently issued to each participant "created a new and independent contract with each policyholder superceding the contract between [MTPA and American Mutual]." (RA-17) The Magistrate further concluded:

> The substantive right which [MTPA] seeks to have established is the right to a final dividend upon termination of the plan. This right was not created by contract between [MTPA] and [American Mutual]. This right enures solely to the policyholders by virtue of a contract of insurance between policyholders and [American Mutual] to which [MTPA] was not a party. It is a right which can be vindicated only by an action by the policyholders under precepts of the law of contracts.
>
> [MTPA] possesses no substantive right to force termination of the plan, determine its terms and provisions, or participate in distribution of dividends. (*Id.*)

The District Court, without a written decision, reversed and vacated the Magistrate's recommendation to dismiss

and scheduled the matter for trial. (RA-25) At trial, a jury awarded MTPA compensatory damages of $237,836 and punitive damages of $1 million.*

On appeal, the Court of Appeals concluded that the jury could reasonably have found that American Mutual's July 1972 proposal to the MTPA became a binding contract, and that American Mutual breached that contract by temporarily retaining some monies in the dividend stabilization fund which had been created pursuant to the modified National Rules in 1978. (A-8) Unlike the petitioner here, the court acknowledged the long history of the National Plan (A-5) and specifically observed that the "actions taken by [American Mutual which constituted the breach] were taken in the belief that they had the right to apply the modified national rules to the [Minnesota logger] safety group." (A-12) Moreover, the court also found that, pursuant to the modified National Rules, all monies previously retained in the dividend stabilization fund were returned to the eligible policyholders by American Mutual in 1980 and 1981 (A-5 and A-6)—approximately one year before this litigation was commenced.

The Court of Appeals affirmed so much of the jury verdict that awarded MTPA interest on the money retained from 1978 to 1980—a total of $92,544. *But see* Ross, C. J., dissenting, on the ground that the Magistrate was correct and, as a matter of law, there was no contract between MTPA and American Mutual. (A-13 and A-14) It reversed the jury's award of $145,292 in additional compensatory

* After trial, five members of the MTPA moved to intervene and to have this matter proceed as a class action. Over American Mutual's opposition, the District Court granted that motion (A-272-73) and this action has proceeded as a class action.

damages and $1 million punitive damages, finding that MTPA had failed to submit the requisite fact issues to the jury to support those awards, and in any event, as a matter of law, the awards could not stand. (A-9 to A-13)

## Reasons for Denying the Writ

MTPA is asking this Court to conduct a detailed review of the extensive summary judgment and trial record. It hopes to convince this Court that the Court of Appeals was wrong when it determined that the full damage award in this case cannot stand because MTPA failed to submit all the necessary fact issues to the jury and that, as a matter of law, (i) there was no fiduciary relationship between MTPA and American Mutual, and (ii) the acts found by the jury to have constituted a breach of contract were insufficient to support the jury's award of $1,000,000 in punitive damages. To justify such an extraordinary and burdensome undertaking by this Court, petitioner has claimed that the decision below violated its Seventh Amendment right to trial by jury and misapplied Rule 49(a) of the Federal Rules of Civil Procedure. These claims are demonstrably without merit and do not warrant review by this Court.

With respect to the Seventh Amendment claim, MTPA, in effect, seeks to deny courts the power to grant summary judgment or judgment n.o.v. to a defendant whenever the plaintiff has demanded a jury trial. It is clear, however, that the Seventh Amendment does not circumscribe the power of a court, including an appellate court, to set aside and reverse a judgment based on a jury verdict where the evidence is insufficient to justify submission of the

issue to the jury. *See, Baltimore & Carolina Line* v. *Redman,* 295 U.S. 654 (1935); *Gregg* v. *U.S. Industries, Inc.,* 715 F.2d 1522, 1530, *clarified in part on rehearing,* 721 F.2d 345 (11th Cir. 1983), *cert. den.,* 104 S Ct. 2173 (1984); *Ballwanz* v. *Isthmian Lines, Inc.,* 319 F.2d 457 (4th Cir. 1963), *cert. den.,* 376 U.S. 970 (1964).

Likewise, in making its Rule 49(a) claim, MTPA ignores the fact that the District Court, with MTPA's full support, refused to submit the requisite fact issues to the jury as specifically requested by American Mutual in its proposed special verdict form. (A-218 to A-220, T-493-505) Thus, the Court of Appeals did not misapply Rule 49(a); rather, as found by the court below, MTPA failed to comply with the Rule's requirements that all necessary issues be submitted to the jury or they are waived.

Stripped of the constitutional rhetoric, petitioner's claim is simply that this case was wrongly decided by the Court of Appeals.* Such a claim does not justify invoking this Court's certiorari jurisdiction which is limited to

> . . . cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those

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* If the Court of Appeals did err it was in petitioner's favor since, as demonstrated by the record facts and as found by the Magistrate and in the dissent below, there was no binding contract between MTPA and American Mutual, and this case should have been dismissed in its entirety.

who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923).

**I. Contrary to petitioner's request, it is not the function of this Court to search the record for evidence of a fiduciary relationship between MTPA and American Mutual.**

Petitioner purports to be "keenly aware that this Court is loathe to grant certiorari to review evidence and specific facts." (Pet., p. 9) But, a detailed review of the record is exactly what petitioner wants this Court to undertake. It contends that the Court of Appeals "overlooked two incredibly important facts" (*id.,* p. 11) and had not "carefully reviewed the record" (*id.,* p. 12), in reaching its conclusion that, as a matter of law, there was no fiduciary relationship between MTPA and American Mutual. Petitioner thus is asking this Court to reassess each piece of evidence in light of the applicable Minnesota law to determine whether a fiduciary relationship existed between the parties. That is plainly not a function this Court should be asked to perform. *See Southern Power Co.* v. *North Carolina Pub. Serv. Co.,* 263 U.S. 508 (1924); *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440 (1918). Such a determination would necessarily be based on the specific facts unique to this case and could not possibly have implication beyond this action.

Moreover, petitioner would have this Court believe that the Court of Appeals' ruling on this issue was made "without explaining the basis of its decision" (Pet., p. 10), and

"without any explanation or support in the record." (*Id.*, p. 12) In fact, the opinion below contains a full discussion of the applicable state law (A-11 and A-12), in light of which the court reviewed the record evidence, and provided a detailed analysis for its conclusion.

> In its essence, this is a contract action. The parties dealt with each other on an arm's length basis and there is no evidence that any type of fiduciary relationship was intended or in fact that any type of confidential relationship existed between American Mutual and the Association. Further, the Association made no showing that American Mutual enjoyed superior or excessive influence over the Association. Rather, the only evidence pointed to by the Association is a statement by an officer of the Association that they "trusted" American Mutual. We conclude as a matter of law that no fiduciary relationship existed between the parties. (A-12)

In light of the fact-bound nature of this issue, and the full and cogent explanation given by the Court of Appeals for the conclusion it reached, intervention by this Court is clearly unwarranted.

**II. Given MTPA's failure to submit to the jury the issues of the alleged termination of the safety group and distribution of the contingent balance, its request for intervention by this Court is inappropriate.**

Petitioner also attacks the Court of Appeals' reversal of the $145,292 portion of the compensatory damage award which approximated the amount in the contingent balance at the time MTPA allegedly terminated the safety group. (See T-402-08; DX-37, B-869) In doing so, petitioner has ignored the Court of Appeals' actual holding and has asserted incorrectly that the court's holding on this issue was that "the Association had no right to terminate the group plan because the contract is silent as to termination." (Pet., p. 14) In fact, the court held that the issue of termination "was not submitted to the jury" and, therefore, it could not provide a basis for recovery of the additional $145,292 in the contingent balance. (A-9)

Despite MTPA's assertion in its petition that the termination issue was "litigated" (Pet., p. 14, subheading c.), the record is clear that with MTPA's full concurrence the District Court did not submit the termination issue to the jury. (T-493 to T-505) Indeed, MTPA objected to the questions in American Mutual's proposed special verdict form which would have secured a jury determination on this issue, and the District Court sustained that objection. (T-495)* Thus, as found by the Court of Appeals,

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* Questions 4 and 6 of American Mutual's proposed special verdict form, which were rejected by the District Court and MTPA (T-495), inquired:

*(Footnote continued on following page)*

MTPA has waived its right to a jury trial on this issue. Rule 49(a), Fed. R. Civ. Pro.

In addition to this waiver by MTPA—which is a complete answer to MTPA's present claim of error—the Court of Appeals also observed that "even if this issue had been submitted to the jury, we do not believe the jury could reasonably have found that the Association's withdrawal terminated the safety group." (A-9) The court noted that the specifics regarding termination of the safety group were neither discussed by MTPA and American Mutual nor included in American Mutual's proposals. (A-9 and A-10) Further, as noted earlier in the court's opinion, the safety group participants included many non-MTPA members. (A-5) Given these facts, the court correctly concluded that MTPA "had no contractual right or authority to terminate the group" and "withdrawal of its endorsement simply ended its contractual relationship with

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*(Footnote continued from preceding page)*

Question 4:

> . . . Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the contract [based on American Mutual's July 1972 proposal] you found in #2 above?

* * *

Question 6:

> . . . Considering all of the contractual relationships you have found to exist, do the provisions of these contracts provide for the distribution of the Contingent Balance Fund as of March 20, 1981 to the Minnesota Timber Producers Association? (RA-29)

The entire special verdict form proposed by American Mutual is reproduced as Appendix C hereto. (RA-26 to RA-31)

American Mutual and absolved both parties of any further performance under the terms of the agreement." (A-10) The lower court's conclusion on this narrow issue hardly warrants further review by this Court, particularly since the Court of Appeals' "error" arises directly from MTPA's objection to submitting the necessary fact issues to the jury.*

Petitioner also has asked this Court to declare that the monies in the contingent balance were not available to cover unexpected losses. (Pet., pp. 13-14) After reviewing the extensive record, the Court of Appeals reached the contrary conclusion. (A-4) A fair reading of the record evidence, including the summary of American Mutual's proposal (App. D to Pet., A-17 and A-18) upon which MTPA has relied so heavily throughout these proceedings, fully supports the lower court's conclusion: The insurance charge for the logger safety group is linked to the contingent balance for that group, and together, they provide American Mutual with a source of funds to help pay losses of safety group participants if the annual premiums of the group are insufficient to cover those losses. (*Id.*) In this case, by 1984 the actual losses paid by American Mutual for this safety group already had exceeded by $40,000 the amounts in the contingent balance at the time MTPA withdrew its endorsement. (See T-402-08; DX-37, B-869)

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* MTPA has incorrectly suggested in its petition that by upholding the interest portion of the damage award ($92,544) the Court of Appeals has awarded MTPA "interest on money it does not own." (Pet., p. 14 n.4) As MTPA has conceded throughout these proceedings (*e.g.*, A-84)—and the Court of Appeals was well aware of this fact—any damages awarded in this action are to be distributed to eligible participants in the Minnesota logger safety group.

In short, these facts cannot justify asking this Court to intervene in this matter and search the extensive record for a reason to overturn the lower court's carefully drawn conclusion.

**III. As determined by the Court of Appeals the fraud issue was not properly submitted to the jury.**

The Court of Appeals correctly noted that "A separate fraud count based on asserted misrepresentations of one of American Mutual's employees was not submitted to the jury." (A-6) MTPA challenges this conclusion by arguing that the alleged fraudulent misrepresentations of Mr. Joe Penn concerning the amount of withheld funds "constitute the activities or 'actions' upon which the fraud count is based." (Pet., p. 16)

In mounting this attack, MTPA again fails to acknowledge that it objected to the special verdict form proposed by American Mutual which would have placed this issue before the jury. Question 9 contained in American Mutual's special verdict form would have asked the jury to determine if establishment of the dividend stabilization fund was "a fraudulent misrepresentation with respect to the amounts of safety group dividend plan money being held by American Mutual?" (RA-30) Because of MTPA's objection to American Mutual's proposed special verdict form (T-493-96), the issue of Mr. Penn's alleged misrepresentation relating to the amount of funds held by American Mutual was not submitted to the jury.

Given these facts, MTPA's related argument that American Mutual consented to MTPA's formulation of the fraud issue (Pet., p. 19) is wholly without merit. As noted above, American Mutual's proposed special verdict form formulated the fraud issue in a materially different way from MTPA's formulation. Moreover, the District Court, again with MTPA's concurrence, rejected American Mutual's requested charge on the elements of fraud. (T-598-99) American Mutual's unsuccessful attempt to have this issue clearly and precisely framed for the jury can hardly be characterized as acquiescence. *See Huddleston* v. *Herman & MacLean,* 640 F.2d 534, 550 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds,* 459 U.S. 375 (1983); *Ford Motor Co.* v. *Dallas Power & Light Co.,* 499 F.2d 400, 407 & n.4 (5th Cir. 1974).

The Court of Appeals thus understandably concluded that it only had to determine "whether the same actions constituting breach [of contract] also constitute the independent tort of fraud." (A-12) Indeed, MTPA's special verdict form does not ask the jury to identify any conduct apart from the creation of the dividend stabilization fund—the alleged breach of contract— which would serve as the predicate to a finding of fraud. The Court of Appeals reviewed the record and concluded that "the breach of contract did not constitute fraud." (A-12) The court's resolution of this issue is clearly correct.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**Memorandum Decision and Recommendation of the United States Magistrate, District of Minnesota, Fifth Division**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civ. No. 5-83-21

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MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

*Plaintiff,*

*vs.*

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Defendant.*

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At Duluth, in said District, this 20th day of September, 1983.

The above-titled case came on for hearing before the undersigned United States Magistrate, pursuant to special assignment in accordance with provisions of Title 28 U.S.C. §636(b)(1)(B), upon motion by defendant for

an order dismissing this action pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, upon grounds that plaintiff is not a real party in interest. See Rule 17(a), F.R.C.P., or, in the alternative, for an order granting summary judgment pursuant to Rule 56, F.R.C.P. Plaintiff appears by Daniel H. Mundt, Esq., and defendant appears by Robert H. Magie, III, Esq.

Numerious documents extraneous to the pleadings have been submitted, considered, and their import argued by both parties. The court, therefore, considers part of the Rule 12(b) motion as converted to a Rule 56 motion.

Upon the file, record, and proceedings, the following Memorandum Decision, incorporating Findings of Fact and Conclusions of Law, is made and entered, and is deemed to comply with form requirements of the Federal Rules of Civil Procedure and Local Rules.

## I.

Defendant is a mutual casualty insurance company incorporated in the State of Massachusetts.

In about 1963, defendant established a Safety Group Dividend Plan for insuring risks engaged in a common business, providing similar services, or manufacturing similar products; and adopted company rules of eligibility for inclusion within such plans, and for their administration.

The Minnesota Timber Producers Association, Inc. (MTPA), is a non-profit corporation organized and existing

under the laws of the State of Minnesota, functioning as a voluntary trade association. The precise purpose of this organization is undisclosed but we can assume that, in general, it is devoted to advancing the interests of timber producers. This action arises from an insurance plan called the Minnesota Timber Producers Workman's Compensation Safety Group Dividend Plan under which defendant has provided worker's compensation insurance to employers in the timber industry.

The initial contact between these parties in this regard occurred in about 1969, and arose from the desire of MTPA to obtain more advantageous rates for worker's compensation coverage for its members. In July, 1972, a Proposal of Insurance Protection for the Timber Producers Association was submitted by defendant. The proposal provided that participation in the plan would be limited to members of the MTPA, who would be individually solicited by defendant to purchase worker's compensation from defendant. Each purchaser would receive an individual policy tailored to its needs. MTPA's participation was limited to its endorsement and recommendation of the plan to its members. The portion of the proposed plan pertinent for our purposes has been denominated the Safety Group Dividend Plan. This plan provided that 24% of the basic premium would be retained and dedicated to this plan by defendant. From this fund, defendant would deduct losses plus a fixed percentage of the fund, which percentage declined as the fund increased, to cover catastrophic losses. Next, a portion of the fund was to be devoted to what is called a contingent balance which was designed to "smooth out" or establish dividend

returns. The amount of the contingent balance was established on a sliding scale percentage of annual premiums. Finally, any surplus of the 24% of basic premiums was to be devoted to payment of dividends to policyholders.

The proposal submitted to MTPA provides that the Contingent Balance Fund belongs to the "Association", not to the insurance company, but contains no provision governing distribution of this fund in the event that the plan is terminated, other than an implication that it would be utilized to pay a final dividend. Defendant's rules for establishing Safety Group Dividend Plans is a little more illuminating. They provide that:

> "In the event of termination of the group, the Contingent Balance, adjusted as herein provided and subject to the determination of the Board of Directors and applicable provisions of law, will be distributed to each member of the group participating at the time of termination or who had participated for at least one year within the two-year period preceding the termination, in proportion to premiums paid by such member in the group during the two-year period preceding the termination, as follows:

| *Time of Distribution* | *Amount of Distribution (% of Contingent Balance) as of Time of Distribution* |
|---|---|
| 18 Months after the termination | 40% |
| 30 Months after the termination | 30% |
| 42 Months after the termination | Remainder" |

***Appendix A***

There is no provision anywhere governing who can terminate the plan, how it is to be terminated, what act or acts constitute termination, when a termination is effective, or any of the many other considerations which would be involved in a termination.

The proposal was accepted by MTPA, and the overall plan, including the Safety Group Dividend Plan, was endorsed by MTPA in December, 1972.

The individual policies issued by defendant, as a result of direct solicitation of persons involved in the timber industry, provide that the insured becomes a member of the company with right to participate in dividends to the extent and upon conditions fixed and determinated by the Board of Directors.

In 1974, the agreement between the parties was amended to permit non-members of the MTPA to participate. At no time were all members of the MTPA participants in the plan, and, after 1974, many non-members were participants.

In March, 1981, the MTPA withdrew its endorsement of the American Mutual Worker's Compensation Safety Group Plan. Some of the policyholders have dropped their American Mutual policy. Others have not, and continue to be insured by American Mutual under the plan.

II.

The Complaint is set forth in three Counts. The first seeks a declaratory judgment that the Minnesota Timber

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Producers Workman's Compensation Safety Group Dividend Plan is terminated, and that distribution of the Contingent Balance Fund be made by defendant to those entitled to it in accordance with the agreement between plaintiff and defendant. Plaintiff makes no direct claim to the fund in this count, and, by inference, one can perceive an inkling of a claim that others were third-party beneficiaries of an agreement, and that it is these rights plaintiff now seeks to have determined. Palintiff's failure to allege a breach of contract lends credence to this inference.

The second count alleges a breach of a warranty made by defendant to plaintiff that the Contingent Balance Fund belonged to the MTPA, and seeks compensatory damages. The court finds this count novel and ingenious, if it is not simply bizarre. The court cannot fathom why the count does not sound in simple breach of contract. Of some importance, however, is what appears to be a claim to the Contingent Balance Fund by plaintiff.

The third count alleges that defendant fraudulently induced plaintiff to endorse the Plan by representing that the Contingent Balance Fund belonged to plaintiff, and that plaintiff is entitled to rescind the agreement, terminate the group, and have the Contingent Balance Fund distributed to those entitled to it. Plaintiff does not seek compensatory damages in this count, but incorporates allegations in Counts I and II to support a claim for punitive damages.

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III.

The defendant's first contention is that the Minnesota Timber Producers Association is not a real party in interest with status to prosecute this action. *See, Rule 17 (a), Federal Rules of Civil Procedure.*

The Declaratory Judgment Act, Title 28 U.S.C. §2201, provides, in pertinent part, that:

> "In a case of actual controversy within its jurisdiction, . . . any court of the United States, . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

The statute contemplates that a court act only in a case of actual controversy brought by an interested party. There must be a definite and concrete dispute touching upon the legal relations of parties claiming adverse legal rights. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

The statute brings into play the case and controversy provision of the Constitution and the substantive doctrine of standing, as well as the procedural rule embodying the real party in interest concept. Plaintiff's argument demonstrates confusion between the doctrine and the concept. This Court will, therefore, first address the question of whether or not this plaintiff has standing to bring this action.

Standing to pursue an action in federal court is simply a shorthand means of stating that a federal court will not

entertain an action unless the plaintiff establishes that he has a right to have the issue raised and decided on its merits by a federal court. This sounds simple, but, in fact, the doctrine of standing is "an area of incredible complexity." *Scanwell Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Its derivation is in the rather cryptic "case or controversy" clause of the United States Constitution. See, U.S. Const. Art. III, §2, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). It involves constitutional, prudential, and collateral jurisdiction limitations. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). Article III judicial power exists only to redress or protect against injury to the complaining party. This is the gist of the case or controversy clause. A plaintiff must, therefore, allege injury, causation, and a putatively unlawful act by defendant to invoke the court's jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490 (1974); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); *Flast* v. *Cohen*, 392 U.S. 83 (1968). This is the constitutional limitation. The collateral limitation is provided by Rule 82, F.R.C.P., which provides that the Rules cannot be interpreted to extend the jurisdiction of the United States District Court. Finally, the courts have imposed prudential limitations on the standing doctrine.

To establish standing, a plaintiff must establish that the grievance is an individual grievance, not one shared generally in a substanially equal measure by all or a large class of the citizenry, *Warth* v. *Seldin, supra; Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937), and that the right asserted is plaintiff's legal right and not the

legal right or interest of a third party. *Warth* v. *Seldin*, *supra*; *Tileston* v. *Ullman*, 318 U.S. 44 (1943).

These general precepts, however, as most, are subject to court engrafted exceptions. One of these is the doctrine of associational standing which permits an association, which has itself suffered no justificable wrong, to appear before the court to seek judicial relief for its members, who have suffered injury sufficient to impress individual standing on them, as the representative of those injured individuals. *Cf., e.g., Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *National Motor Freight Traffic Ass'n., Inc.* v. *United States*, 372 U.S. 246 (1963). The courts have determined that such plaintiff is not advocating the rights of a third party for personal redress, but possesses a derivative right to seek redress for its individual members by virtue of a special relationship which exists between the association and its members. The special relationship necessary to support associational standing arises when:

> a) Individuals who are members of the association have standing to pursue the cause of action as a personal right.
>
> b) There exists a substantial nexus between the plaintiff organization and the members to the extent that the members control the organization.
>
> c) The interest which the organization seeks to protect is germane to the purpose of the organization, and

d) Neither the claim asserted nor the relief requested requires the individual participation of members in the lawsuit.

*See, Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin, supra; N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992 (D.C. Cir. 1979), *cert. den.* 445 U.S. 915 (1980); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21 (D.C. 1979).

A review of authority reveals two major fact situations in which associational standing is generally recognized. The first arises in cases in which an association invokes the judicial-review provision of the Administrative Procedure Act, Title 5 U.S.C. §701 *et seq.*, to attack government action which affects the public purpose for which the association exists. *See, e.g., Sierra Club v. Morton, supra; N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert den.* 400 U.S. 949 (1970). This line of authority has no relevance to the case sub judice.

The second line of authority involves standing of labor unions, and, to a lesser degree, trade associations, to pursue actions for the general benefit of its members. Plaintiff relies on these cases in its argument. The facts of this case, however, lack preciseness to fit into an analogy. The standing of an association to seek relief is predicated upon the proposition that the association's actions are associated actions for benefit of those associated. Standing of

the association to pursue an action depends to a large measure upon the nature and extent of the relief sought. We must, therefore, look to each count of the Complaint to determine standing in this plaintiff to pursue the cause presented by that count. *Cf., United Steelworkers, Etc.* v. *University of Ala.,* 599 F.2d 56 (5th Cir. 1979).

The first count seeks both a declaratory judgment that the Dividend Plan is terminated, and a distribution of the funds in the Contingent Balance Fund. Such judgment would affect individual rights of all policyholders—member and non-member alike—who had participated in the plan within the two year period preceding the termination, and, to a greater degree, current participants. Plaintiff seeks, in effect, to terminate the insurance contracts of current policyholders with defendant. There has been no showing that the current policyholders desire this result, or that it will work to their benefit. Secondly, although participation in the liquidation of the Contingent Balance Fund is in the nature of a refund of premiums paid, it is akin to damages. Not all members of the association will participate in the distribution, and policyholders who do participate will do so in unequal degree on an individual basis dependent upon the extent of their individual participation in the plan. Plaintiff seeks, therefore, to advance individual rights rather than general associational rights. Plaintiff does not possess standing to assert the personal and individual rights of policyholders which require individual proof.

Secondly, the doctrine of standing was developed as both a constitutional limitation on the powers of the court, and as a discretionary prudential doctrine to manage the

business of the court. It is no more than one aspect of justiciability. *See, Flast v. Cohen,* 392 U.S. 83 (1968). ated with all of the complexities and vagaries which arise from the complicated blend of constitutional requirements and policy considerations which compose the concept of justiciability. *See, Flast v. Cohen,* 392 U.S. 83 (1968). This renders generalization impossible and worthless, and elevates prudential considerations to a paramount position. *Cf., Frothingham v. Mellon,* 262 U.S. 447 (1923); *Middlewest Motor Freight Bureau* v. *United States,* 525 F.2d 681 (8th Cir. 1975). Policy considerations, in this case, dictate that the diverse and divergent interests of individual policyholders be advanced and represented by those policyholders, and not by this association, which does not represent all policyholders and whose position may not reflect the best interests of each policyholder. Even if one were to conclude that the elasticity of the Constitution imbues this plaintiff with technical standing, it appears prudent to deny plaintift standing under these circumstances.

The second and third counts are premised upon alleged contractual or tort related rights of the MTPA as such. As tenuous as these claims may be, plaintiff cannot be denied standing to assert its own rights in this Court.

## IV.

Standing aside, we can turn to the precise issue raised by this motion, for even one with substantive standing is bound by procedural rules.

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Rule17(a) contemplates that an action must be brought by a party who possesses the substantive right being asserted in the lawsuit. *Iowa Pub. Serv. Co.* v. *Medicine Bow Coal Co.*, 556 F.2d 400 (8th Cir. 1977); *Mason-Rust* v. *Laborers' International Union, Local 42*, 435 F.2d 939 (8th Cir. 1970); *Vesnon J. Rockler & Co.* v. *Graphic Enterprises, Inc.*, 52 F.R.D. 335, 339 n. 5 (Minn. 1971); *Koepp* v. *Northwest Freight Lines*, 10 F.R.D. 524 (Minn. 1950). The enumeration in the Rule of persons who can be real parties in interest acting in representative capacities is illustrative, not exclusive. *Adv. Comm. Note to 1966 Amendment*, 39 F.R.D. 84, 85. The court can disregard labels, and view as a real party in interest anyone possessing a sufficiently substantial legal interest in the action to enable him to be heard on the merits. In order to apply the procedural rule, therefore, it is necessary to establish the derivation of the substantive right at issue. In a case, such as this, in which the jurisdiction of the federal court is invoked on the basis of diversity of citizenship, the federal courts merely provide a remedy for traditional state actions. State law provides the substantive right. *Iowa Pub. Ser. Co.* v. *Medicine Bow Coal Co., supra; Dubuque Stone Products Co. v. Fred L. Gray Co.*, 356 F.2d 718 (8th Cir. 1966); *Dougherty* v. *Oberg*, 297 F. Supp. 635 (Minn. 1969); *DeWitt* v. *Quarterback Sports Federation, Inc.*, 45 F.R.D. 252 (Minn. 1968).

Again, because the Complaint is set forth in separate counts embodying diverse claims of substantive rights, each count must be afforded individual consideration to determine whether or not plaintiff has capacity to assert that right.

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The first count of the Complaint seeks to establish rights under an agreement. It is hornbook law that, except for third-party beneficiaries, only one who is a party to a contract can sue to enforce its terms, or recover damages for its breach. *See e.g., Harriet State Bank v. Samels,* 164 Minn. 265, 204 N.W. 938 (1925); *Ingelson* v. *Olson,* 199 Minn. 422, 272 N.W. 270 (1937). We must, therefore, commence by identifying the contract upon which plaintiff relies, and ascertaining its terms and conditions as they relate to plaintiff's claim. Plaintiff contends that the proposal made by defendant was an offer which became a binding contract when accepted by plaintiff. The court accepts this proposition. Plaintiff then outlines what it considers to be the terms of that contract which impose rights and obligations on the parties. These contain deviations from the provisions of the proposal, but, where pertinent, will be set out verbatim with the court's comments or correction appended parenthetically.

> "A. MTPA would endorse the plan and recommend it to individual members for purchase."

(The plan would be endorsed, but the recommendation would be to purchase an insurance policy.)

> "I. The dividend plan which was available only to safety group members provided by agreement that:
>
> 5. The 'contingent balance' was a stabilizing fund, to establish and smooth out dividend returns, not to protect American Mutual from catastrophic losses. The 'insurance charge' served that purpose. The 'contingent balance'

dollars belong to the MTPA, not the insurance company. The 'contingent balance' was to be built up until it reached 20% of annual premium on the first $100,000, 15% on the next $400,000, and 10% on amounts over $500,000."

(The proposal refers to the "Association", not MTPA, and safety group members were policyholders by definition).

"6. The balance then remaining after deducting the above items was to be paid to the members as dividends in proportion to the premium paid by each."

In addition, the proposal contained the following provisions regarding dividends:

"III. DIVIDEND DECLARATION

A. Determined by MPI's directors using dividend guideline rules.

B. Paid approximately eight months following the end of each annual period.

. . .

V. DIVIDEND DISTRIBUTION

1. Dividends are declared to policyholders at a uniform rate in proportion to each policyholder's share of the total group premium regardless of individual experience.

2. Distribution.

*Appendix A*

A. Normally directed to policyholders.

B. May request policyholders to execute an assignment of dividends to sponsoring association."

There is an obvious ambiguity and conflict in and between the provisions stating that the contingent fund belonged to the Association, as such, and the provisions stating that it would be utilized to pay dividends to policyholders, unless assignment of dividends to the association was executed. The only reasonable manner in which the provisions can be reconciled is to read association and MTPA as meaning members of the association who became policyholders. Even this interpretation must be amended, however, in the light of later events. When non-members of the MTPA were permitted to participate in this plan, any semblance of reason to consider the Contingent Fund as property of the MTPA disappears.

The terms of a contract may be modified by a subsequent course of dealing between the parties, *Trovatten* v. *Minea*, 213 Minn. 544, 7 N.W.2d 390 (1942); *Wormsbecker* v. *Donovan Constr. Co.*, 247 Minn. 32, 76 N.W.2d 643 (1956), and where a contract contemplates execution of other instruments as part of the performance of the contract, the subsequent instruments are binding insofar as elements of the contract are embodied therein. *Bradley* v. *Paul*, 153 Minn. 441, 190 N.W. 797 (1922). The proposal clearly contemplates defendant writing and issuing an individual insurance policy to each participant. This was done, and each policy provided that:

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> "The insured is a member of the company and shall participate, to the extent and upon the conditions fixed and determined by the Board of Directors in accordance with the provisions of law, in the distribution of dividends so fixed and determined."

This effectively amended and modified any conflicting provision in the proposal, or, if you will, created a new and independent contract with each policyholder superceding the contract between plaintiff and defendant.

The substantive right which plaintiff seeks to have established is the right to a final dividend upon termination of the plan. This right was not created by contract between plaintiff and defendant. This right enures solely to the policyholders by virtue of a contract of insurance between policyholder and defendant to which plaintiff was not a party. It is a right which can be vindicated only by an action by the policyholders under precepts of the law of contracts.

Plaintiff possess no substantive right to force termination of the plan, determine its terms and provisions, or participate in distribution of dividends. It is not a real party in interest in regard to Count I.

The mysterious aspects of plaintiff's second count were not addressed by counsel, and the enigma posed is unsolvable by this Court. A warranty is an allegation of an existence of fact—expressed or implied. It almost invariably flows from a purchase-sale contract to the immediate or ultimate purchaser. It differs from a representation in that it is given contemporaneously with, and as part of, a contract; whereas a representation precedes, and serves

to induce, the formation of a contract. The sentence upon which the plaintiff premises this claim appears in the section of the proposal concerning the Contingent Balance Fund which reads:

> "Dollars belong to Association, not to Insurance Company."

There was no fund at this time, and we cannot consider this a statement of present fact. It can only be a representation of what would be in the future, after policies had been sold, premiums paid, and a fund established. This is not a warranty and cannot support a breach of warranty action. At best, what plaintiff has here is an action based upon misrepresentation or breach of contract. As presently framed, Count II does not state a claim upon which relief can be granted, as a matter of substantive law.

Count III sounds in fraud in the inducement of the contract. Plaintiff correctly alleges that such fraud entitles it to rescind the contract. The agreement between plaintiff and defendant was no more than that defendant would offer an insurance program, including the dividend plan, to timber producers, and that plaintiff would endorse that plan. Insurance contracts were with individual policyholders. Plaintiff has effectively rescinded and unmade the contract which it had with defendant by retracting its endorsement. The effect of this rescision is to extinguish the contract so effectively that in contemplation of law, it never existed. *Koch* v. *Han-Shire Investments, Inc.*, 273 Minn. 155, 140 N.W.2d 55 (1966). Plaintiff has elected its remedy. A contract which never existed cannot support

an action for compensatory damages for fraud in inducement of the non-existent contract, and certainly cannot support an action for compensatory damages for fraud in inducement of the non-existent contract, and certainly cannot support an action for exemplary damages which cannot be recovered in the absence of a compensatory damage award. *See, Meixner* v. *Bueckler,* 138 Minn. 586, 13 N.W.2d 754 (1944); *Burmaster* v. *Alwin,* 138 Minn. 383, 165 N.W. 135 (1917). Count III does not state a claim upon which relief can be granted, as a matter of substantive law.

*Conclusion*

a.

The evidence presented establishes that the contract established by plaintiff's acceptance of the proposal made by defendant, as amended by the contemplated issuance of insurance policies by defendant to those desiring them and the subsequent course of dealing between the parties, imposed upon plaintiff one obligation, that of endorsing the plan and recommending it to its members. It imposed upon defendant the obligation to enroll purchasers of insurance policies in the dividend plan in accordance with terms of those policies and rules of the insurance company. There is no agreement regarding termination of the plan by participants. The termination of the plan, dividend payment, and distribution of the Contingent Balance Fund is governed soley by rules of the insurance company. A policyholder can terminate its participation in the plan by dropping coverage, but this does not effect

a termination of the plan for other policyholders. The funds in the Contingent Balance Fund at termination of the plan belong to eligible policyholders and not to plaintiff.

Plaintiff is not a real party in interest empowered to maintain an action to terminate the plan, to determine that the plan has been terminated by its unilateral action, or to force distribution of a dividend from the Contingent Balance Fund to whomever might be entitled to such dividend. However, rather than rest a decision on procedural grounds, and afford reasonable time for ratification of this action by all policyholders, past and present, or joinder or substitution of such policyholders, prudence dictates that, at this early stage, plaintiff be found to be without standing to pursue this action. The number of policyholders whose rights would be affected by termination of this plan, and who would be eligible to participate in a termination dividend, does not appear to be unwieldy if all are joined in one action, or included in a class for a class action suit. Any inconvenience is outweighed by an assurance that all who are to be affected have notice, and an opportunity to protect their interests.

b.

There is no dispute as to any material fact, the court has received and considered matters extraneous to the pleadings, and the record contains all evidence available to either party. The motion is, therefore, effectively converted to one for summary judgment.

*Appendix A*

The orderly administration of justice mandates that this plaintiff state its claim in a cognizable manner. The summary judgment rule, *Rule 56(c), F.R.C.P.*, provides, in part, that:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

This rule serves a useful purpose in the scheme of judicial administration by providing a vehicle through which fictitious, vexatious, or unsubstantial fact issues can be separated from genuine substantive fact issues which are properly reserved for resolution by a trier of fact. The rule enables a litigant to present to the Court for determination in a summary fashion those cases which can be determined solely upon questions of law. The Court of Appeals, in various ways, has repeatedly recited the limited circumstances in which it deems summary judgment appropriate. *See, e.g., McMahon v. Meredith Corporation*, 595 F.2d 433 (8th Cir. 1979); *Williams* v. *Evangelical Retirement Homes*, 594 F.2d 701 (8th Cir. 1979); *Narez* v. *Wilson*, 591 F.2d 459 (8th Cir. 1979); *Starling* v. *Valmac Indus., Inc.*, 589 F.2d 382 (8th Cir. 1979); *McCamly* v. *Moss*, 587 F.2d 391 (8th Cir. 1978); *EEOC* v. *Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978); *Robert Johnson Grain Co.* v. *Chemical Interchange Co., supra; Goodman* v. *Pawatikar*,

*supra; Windsor* v. *Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975). There are cases, however, where the facts which the plaintiff can prove are not sufficient to permit recovery under the law upon which the plaintiff relies. This case falls within that category.

The claim of plaintiff which is based upon breach of warranty is without substance.

The claim of plaintiff for punitive damages based upon fraud is barred by the doctrine of election of remedies and failure to claim supportive compensatory damages. Summary judgment is the proper procedural vehicle to dispose of these claims economically and efficiently. This is the purpose for which the rule was adopted.

WHEREFORE, It is—

RECOMMENDED:

1. That Count I of plaintiff's Complaint be dismissed.

2. That defendant be granted summary judgment on Count II of plaintiff's Complaint.

3. That defendant be granted summary judgment on Count III of plaintiff's Complaint.

PATRICK J. MCNULTY
UNITED STATES MAGISTRATE

Attention is drawn to Local Rule 14 and the attached.

*Appendix A*

NOTICE

Pursuant to Local Rule 14C(b) any party may object to this Memorandum Decision and Recommendation by filing with the Clerk of Court, and serving all parties, within ten (10) days a writing which specifically identifies those portions of this report to which objection is made and the basis for that objection. Failure to comply with this provision shall operate as a forfeiture of the objecting parity's right to seek review in the Court of Appeals.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. §636 to review a transcript of the hearing in order to resolve all objections made to this Memorandum Decision and Recommendation, the party making the objections shall timely order, and cause to be filed within ten (10) days, a complete transcript of the hearing.

## APPENDIX B

**Minutes of Proceedings of the United States District Court for the District of Minnesota, Fifth Division**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

No. Civil 5-83-21

---

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

*Plaintiff,*

*vs.*

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Defendant.*

---

Date 12-8-83

Judge MWL

Reporter Rafel

Counsel for Plaintiff Daniel H. Mundt

Counsel for Defendant Mark Anderson

Oral argument on plaintiff's objection to Report & Recommendation issued by Magistrate Patrick J. McNulty

on September 20, 1983. Court reversed and vacated the Recommendation. Matter set for trial—February, 1984.

(signed) CONNIE L. GRENSING
Deputy Clerk

## APPENDIX C

**Respondent's Proposed Special Verdict Form**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civ. No. 5-83-21

---

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

*Plaintiff,*

*vs.*

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Defendant.*

---

TO: CLERK OF U.S. DISTRICT COURT:

Defendant, American Mutual Insurance Company of Boston, submits the attached Proposed Special Verdict Form as per the standing Order executed by the Court on March 8, 1984.

DATED this 12th day of April, 1984.

Respectfully submitted,

DONOVAN, MCCARTHY, CRASSWELLER & MAGIE
By: ROBERT H. MAGIE, III
Attorneys for Defendant
1000 Alworth Building
Duluth, Minnesota 55802
218/722-1411

*Appendix C*

SPECIAL VERDICT FORM

QUESTION 1:

Was there a contract between Plaintiff, Minnesota Timber Products Association, Inc. and Defendant, American Mutual Insurance Company of Boston, which provided that Defendant, American Mutual, would organize and implement a dividend safety group pursuant to its national plan in exchange for the sponsorship of the Minnesota Timber Producers Association, Inc?

ANSWER:_____

(Yes or No)

QUESTION 2:

Did Plaintiff, Minnesota Timber Producers Association, Inc. and Defendant, American Mutual Insurance Company of Boston enter into a contract in 1972, the terms and conditions of which were contained in American Mutual's pamphlet entitled, "A Proposal of Insurance Protection", provided to Plaintiff on July 28, 1972?

ANSWER:_____

(Yes or No)

QUESTION 3:

Did all the participants of the Safety Group Dividend Plan enter contracts directly with Defendant American Mutual Insurance Company of Boston

with the issuance of each policy of insurance from American Mutual to the individual policyholders?

ANSWER:_____
(Yes or No)

QUESTION 4:

Only if you answered "Yes" to question #2 above, answer this question: Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the contract you found in #2 above?

ANSWER:_____
(Yes or No)

QUESTION 5:

Only if you have answered "Yes" to question #3 above, answer this question: Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the individual contracts you found in #3 above.

ANSWER:_____
(Yes or No)

QUESTION 6:

Only if you have answered "Yes" to questions #2, #3, #4 and #5 above, answer this question: Considering all of the contractual relationships you have found to exist, do the provisions of these contracts provide for the distribution of the Contingent Balance Fund as of March 20, 1981 to the Minnesota Timber Producers Association?

ANSWER:_____
(Yes or No)

*Appendix C*

QUESTION 7:

What amount of money was in the Contingent Balance Fund as of March 20, 1981?

ANSWER: $_____

QUESTION 8:

Considering all of the contractual relationships that you have found to exist, did American Mutual Insurance Company of Boston breach those contracts by establishing the Dividend Stabilization Fund?

ANSWER:_____
(Yes or No)

QUESTION 9:

Was the establishment of the Dividend Stabilization Fund a fraudulent misrepresentation with respect to the amounts of safety group dividend plan money being held by American Mutual?

ANSWER:_____
(Yes or No)

QUESTION 10:

Only if you answer "Yes" to either or both of questions #7 and #8 above, then answer this question: What amount of money represents the damage, if any, suffered by Plaintiff, Minnesota Timber Producers Association, Inc., as a result of the findings which you made in question #7 and #8?

ANSWER: $_____

*Appendix C*

QUESTION 11:

Only if you found that Defendant's conduct directly caused damage to Plaintiff Minnesota Timber Producers Association, Inc. in question #9 above, answer this question: If you find that Defendant's conduct directly caused injury to Plaintiff Minnesota Timber Producers Association, Inc., do you find that Defendant's conduct was so willful or so malicious that justice requires you to award the Minnesota Timber Producers Association, Inc. an amount which will serve to punish Defendant and to deter others from the commission of like acts?

ANSWER:_____

(Yes or No)

QUESTION 12:

Only if you answer "Yes" to question #11 above, answer this question: What amount of money should Defendant pay as punitive damages as a result of the findings that you made in question #11 above?

ANSWER: $_____

Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-813

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
*Petitioner,*

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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# No. 85-813

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
*Petitioner,*

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

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## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner Minnesota Timber Producers Association, Inc. (the Association) submits herein its reply to respondent American Mutual's Brief in Opposition.

### STATEMENT

The Association's petition involves a substantial federal procedural question. Its petition should be granted for the following reasons:

1. The Eighth Circuit Court's application of Rule 49(a) is in direct conflict with the Fifth Circuit application of Rule 49(a); and

2. If left to stand, the Eighth Circuit opinion will effectively nullify and emasculate Rule 49(a).

Respondent American Mutual Insurance Company of Boston (American Mutual) attempts to blur the legal questions contained in the Association's petition. The extended, inaccurate and extraneous factual statements concerning the operation of the Minnesota Timber Producers Association-American Mutual Worker's Compensation Safety Group Plan are nothing more than "red herrings."

No unresolved factual issues exist. All relevant issues of fact were determined by the jury. The questions petitioner seeks to have reviewed by this Court are whether the Eighth Circuit Court of Appeals violated Rule 49(a) of the Federal Rules of Civil Procedure and the petitioner's Seventh Amendment right to a jury trial by reversing certain portions of the trial court's judgment.

## LEGAL ISSUES

### 1. Rule 49(a) Assumes Findings In Accordance With The Special Verdict On Omitted Issues And Therefore The Judgment Is Deemed To Include A Finding Of Fraud.

The Association has never, and does not now, agree with the Court of Appeal's determinations that the issue of fraud was not submitted to the jury and that no fiduciary relationship existed between the parties as a matter of law. Assuming the Court of Appeals is correct in holding that the fraud issue was never submitted, it has clearly erred by ignoring the plain language of Rule 49(a) that such a finding is *deemed* to have been made by the trial court. See *Guidry v. Kem Manufactur-*

*ing Company,* 598 F.2d 402, 406, *reh'ing denied* 604 F.2d 320, (5th Cir. 1979), *cert. denied,* 445 U.S. 929.

In *Guidry,* the Fifth Circuit held:

> The rule itself provides insurance against one hazard: the necessity that the jury decide every element of recovery or defense lest the verdict remain incomplete and indecisive. If counsel do not timely request that an issue be submitted to the jury, it may be resolved by the court. *If the Court fails to make a finding, "it shall be deemed to have made a finding in accord with the judgment on the special verdict."* F.R.Civ.P. 49(a). *Guidry v. Kem Manufacturing Company,* 598 F.2d at 406 (emphasis added). Cf. Court of Appeals decision herein (Appendix A of Petitioner's Petition at p. A-6 and p. A-12)

American Mutual totally misstates Rule 49(a) of the Federal Rules of Civil Procedure when it pronounces that "MTPA failed to comply with the Rule's requirements that all necessary issues be submitted to the jury or they are waived." (Br. in Opp. at p. 13). This is a misleading statement of Rule 49(a) and is obviously not consistent with the language or intent of the Rule. Cf. *Molex, Inc. v. Nolen,* 759 F.2d 474, 478 (5th Cir. 1985) (rule is unambiguous and the court has given its words their plain meaning).

Rule 49(a) provides that when an issue is not specifically submitted to the jury, the trial court may make a finding and if it does not, a finding shall be deemed to have been made in accordance with judgment on the special verdict. *Fed. R. Civ. P.* 49(a). See *Hinshaw v. New England Mutual Life Insurance Company,* 104 F.2d 45, 48-49 (8th Cir. 1939) (where trial court made no finding but entered judgment for plaintiff, court of appeals assumes a finding in accordance with the judgment).

Even assuming the fraud issue was not submitted to the jury, under Rule 49(a) it is presumed that the trial court passed on the

issue in accordance with the judgment. Therefore to justify reversing the trial court's judgment requires an analysis whether the trial court's determination was clearly erroneous. The Court of Appeals' decision is completely devoid of any such analysis.

The Court of Appeals erroneously believed that its duty was fulfilled once it had determined that the issue of fraud was not submitted to the jury. (See A-6). Reversing that part of the trial court's judgment founded on fraud solely on the basis that the issue was not submitted to the jury contravenes Rule 49(a)[1] and abrogates the Eighth Circuit's prior correct decisions on Rule 49(a). See *Hinshaw*, 104 F.2d at 48-49. More seriously, the decision directly, and embarrassingly, conflicts with the correct interpretation of Rule 49(a) by the Fifth Circuit.

**2. Rule 49(a) Directs That The Issue Of Fraud Be Resolved In Favor Of Petitioner.**

Respondent makes the incredible argument that if the Association had not objected to Respondent's special verdict form, the Association would have successfully submitted the issue of fraud to the jury. (Br. in Opp. p. 19) Respondent's argument is that since the Association objected to American Mutual's proposed special verdict form, the issue of Mr. Penn's misrepresentations was not submitted to the jury and the Association should not now be heard to complain. (*Id.*)[2]

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[1] Petitioner brought this patent error concerning rule 49(a) to the Court of Appeals' attention in its Petition for Rehearing. Petitioner's plea, however, fell on deaf ears. See Appendix C of Petitioner's Petition at A-16.

[2] American Mutual's confused argument pertaining to Rule 49(a) only reaffirms petitioner's suggestion that direction by this Court is needed concerning Rule 49(a).

Petitioner has demonstrated that the fraud issue was submitted to the jury. (See Petition for Writ of Certiorari pp. 16-19) American Mutual attempts to cloud this fact.

Even assuming that American Mutual is correct on the submission issue, Rule 49(a) directs a finding of fraud in accordance with the judgment. As such the judgment is not subject to summary reversal by the Court of Appeals, as was done here. Rather some analysis or reasoning other than simply stating the issue was not submitted to the jury is clearly required. For this reason, the Court of Appeals' determination that the issue was not submitted the jury and therefore not determined by the trial court is a gross error which should be corrected by this Court.

### 3. Petitioner Is Not Asking This Court To Review Questions Of Fact.

The Association's petition requests review by this Court of the manner and method by which the Court of Appeals reached its erroneous conclusions.[3] This request raises a substantial federal question. The Association does not seek review simply because the Court of Appeals' decision misconstrues the facts and erroneously applies Minnesota law.

The Association is not asking this Court, as suggested by respondent, to reassess each piece of evidence to determine whether a fiduciary relationship based on Minnesota law existed between the parties. (Br. in Opp. p. 14)

The Eighth Circuit Court of Appeals found as a matter of law that no fiduciary relationship existed between American Mutual and the Association. Yet, the existence of such a relationship is a question of fact in Minnesota. *Murphy v. County House, Inc.*, 240 N.W.2d 507 (Minn. 1976).

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[3] In addition to the fraud issue, the Court of Appeals also erred on the contract termination issue for basically the same reasons.

This case may entail a limited review by this Court of certain evidence, or lack thereof, submitted in this case. The mere fact, however, that such a limited collateral review may be necessary to determine whether the Court of Appeals has erred in certain legal rulings is not something new to this Court. See, e.g., *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959); *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958).

To allow the appellate courts to give Rule 49(a) the effect suggested by American Mutual will abrogate the intent of the Rule and deny parties the protection of the Seventh Amendment while adding to the congestion of the courts. The question to be asked is what purposes do Rule 49(a) or the Seventh Amendment serve if an appellate court can, with impunity, circumvent and violate the procedure contained in Rule 49(a) and the rights provided by the Seventh Amendment?

## CONCLUSION

Obviously any special verdict form will leave many factual details directly unanswered. Because of these unanswered questions, Rule 49(a) requires that these questions be resolved in favor of the prevailing party at trial by drawing logical inferences from the jury's answers and making certain assumptions based on the trial court's judgment. The Court of Appeals' summary reversal of portions of the trial court's judgment ignores the clear mandate of Rule 49(a) and directly conflicts with decisions of other circuit courts of appeal. The Association's petition raises this important question of federal procedural law.

Moreover, for the Court of Appeals to step in and reweigh the evidence considered by the jury and substitute its judgment for that of the trier of fact exceeds the Court of Appeals' constitutional authority and impinges on the Association's Seventh

Amendment right to trial by jury. For these reasons, Petitioner respectfully renews its request that its Petition for a Writ of Certiorari be granted.

Dated: December, 1985

Respectfully submitted,

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